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**Human Rights Council**
**Working Group on Arbitrary Detention**

# Opinions adopted by the Working Group on Arbitrary Detention at its eighty-first session, 17–26 April 2018

## Opinion No. 36/2018 concerning Ngô Hào (Viet Nam)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 33/30.

2. In accordance with its methods of work (A/HRC/36/38), on 1 February 2018, the Working Group transmitted to the Government of Viet Nam a communication concerning Ngô Hào. The Government replied to the communication on 24 April 2018. The State is a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

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**Submissions**

*Communication from the source*

4. Mr. Hào is a 69-year-old Vietnamese citizen who resides in Tuy Hòa City, Phú Yên Province, Viet Nam. According to the source, Mr. Hào is a blogger and human rights defender who has sought to exercise his rights to freedom of expression and association through a range of activities.

5. The source reports that Mr. Hào served in the South Vietnamese Army before the reunification of Viet Nam in 1975. He was placed in a "re-education camp" due to his support for the South (backed by the United States of America) during the Viet Nam War, and subsequently as punishment for his role in establishing the Lien Minh Viet Nam Party (Viet Nam Alliance Party).

6. Since 2008, Mr. Hào has been a campaigner on a range of matters of public interest within Viet Nam. He has used the Yahoo Groups online blogging platform to publish and disseminate articles in which he has criticized the Government. Many of his articles relate to human rights issues such as land confiscation and harassment of religious leaders. On 9 February 2012, Mr. Hào posted a blog post on Yahoo Groups discussing the suffering of citizens due to the activities of the ruling Communist Party. Mr. Hào has advocated for the rights of land reform victims by petitioning the President of Viet Nam. He has also engaged in advocacy on behalf of imprisoned members of the Hòa Hao Buddhist movement, and the 22 imprisoned members of the Bia Son environmental group.

7. The source claims that Mr. Hào was arrested and detained against a background of restrictions on the freedoms of expression and association, and the right to participate in political affairs. In addition to media and Internet laws, provisions of the Criminal Code of Viet Nam have been key to the suppression of freedom of expression, and are routinely employed to imprison human rights defenders and bloggers. Several of these laws have been criticized for violating the obligations of Viet Nam under international human rights law with respect to freedom of expression, but no steps have been taken to repeal them. In addition, Viet Nam has faced widespread criticism for its failure to uphold due process and basic fair trial guarantees.

*Arrest and detention of Mr. Hào*

8. The source alleges that, since 2008, Mr. Hào has received regular cautions from the police warning him against his activities, which were deemed to be contrary to the interests of the State. On 20 December 2012, his home was searched by the police and inspectors of the Department of Information and Communication. This search was carried out within three days of his posting a blog post that was particularly critical of the Communist regime. It appears that no warrant was provided prior to this search, which lasted only 15 minutes.

9. The search record documents the removal of materials from Mr. Hào's home and computer that purportedly demonstrate that Mr. Hào was using the Internet to spread distorted information that infringed upon the interests of organizations and citizens. This information included telephone numbers in the United States, contact details for Radio Free Asia, a SIM card and micro Secure Digital memory stick, communications with a member of Bloc 8406 and Veto! Human Rights Defenders' Network, a document calling on international human rights bodies and individuals to advocate for the release of an imprisoned activist, and a document relating to a radio programme that alleged corruption by a senior officer of the Phú Yên police. The items removed from Mr. Hào's computer also included a document containing an image of the flag of the former Republic of Viet Nam, which was allegedly planted by the authorities during the search. The police claimed that Mr. Hào's old military coats were evidence of his attempts to overthrow the Communist regime.

10. On 8 February 2013, Mr. Hào was asked to come to a police station in Tuy Hòa City for questioning. His son arrived at the station an hour later and was informed of his father's arrest. According to the source, no arrest warrant was produced at that time. Mr. Hào was charged under article 79 of the Criminal Code with taking actions "aimed at overthrowing the people's administration". Mr. Hào was held in a detention centre in Tuy Hòa City for 12

months. During a pretrial visit, Mr. Hào told a family member that he had been tortured by the police to extract a confession. The confession was allegedly obtained through removing his clothes and continuously pouring cold water onto his body.

*Trial proceedings and appeal hearing*

11. According to the source, Mr. Hào's trial was held seven months after his arrest, on 11 September 2013, before the People's Court of Phú Yên Province. His family was notified of the trial date only a week in advance, and was unable to appoint a lawyer. A State defence lawyer was appointed to act for Mr. Hào, but he opted to represent himself because he was prevented from appointing a lawyer of his choice. The source alleges that only Mr. Hào's family was permitted entry into the courthouse, which was occupied and surrounded by police to prevent public attendance. Mr. Hào was escorted into the courtroom by 30 uniformed police officers, and was prevented from addressing the court throughout the hearing. He was only permitted to give yes/no responses to questions and could not cross-examine or call witnesses in his defence.

12. On the same day, Mr. Hào was convicted of taking actions "aimed at overthrowing the people's administration" under article 79 of the Criminal Code, and was sentenced to 15 years' imprisonment, with a further 5 years of house arrest. He was found guilty of archiving, writing, disseminating and sharing articles that contained distorted information about Viet Nam and that were defamatory of some of the country's leaders. In addition, he was found guilty of calling upon individuals to intervene against the State, and to campaign for human rights and democratic reforms. He was convicted of being involved with several pro-democracy and civil society groups and organizations, including Bloc 8406, an online coalition of political groups and individuals seeking democratic reform in Viet Nam. Mr. Hào's communications seeking to be registered as an official member of Bloc 8406 were cited as evidence against him in the judgment of the People's Court. The judgment openly recognized that Mr. Hào's offending activities were carried out in a non-violent form.

13. The source alleges that Mr. Hào was initially denied a copy of the trial judgment, which was to be used in order to appeal against his conviction. His family was prohibited from appealing on his behalf on the ground that they were "not related to him". An appeal was eventually lodged on 23 September 2013. The appeal was rejected by the Supreme People's Court on 23 December 2013 on the ground that there was sufficient evidence to find Mr. Hào guilty of involvement in the alleged acts.

14. The source reports that, on 8 February 2014, Mr. Hào was transferred to Xuân Phước Prison, where both his physical and mental health rapidly deteriorated due to a lack of access to proper medical treatment for his stomach ulcer, paralysis and hearing difficulties, and to the effects of forced hard labour. On 9 February 2015, Mr. Hào was transferred to An Diem Prison, located over 300 km from his family home, which has rendered visits difficult. During a visit from a family member on 27 May 2016, Mr. Hào disclosed that he had suffered from a stroke and had been taken to the prison clinic. Mr. Hào's family is concerned about his deteriorating health. Mr. Hào has been in detention for over five years.

*Submissions on arbitrary deprivation of liberty*

15. The source submits that Mr. Hào's deprivation of liberty is arbitrary according to categories II and III.

16. In relation to category II, the source asserts that Mr. Hào has been deprived of his liberty as the result of exercising his rights to the freedoms of expression and association, and to take part in the conduct of public affairs.

17. The source submits that, given Mr. Hào's activities as a human rights blogger and defender, the real purpose of his detention is to punish him for the peaceful exercise of his rights under article 19 of the Covenant, and to deter others from exercising their right to freedom of expression. The source recalls that the arbitrary arrest and detention of online journalists is widespread in Viet Nam. Mr. Hào's situation is yet another example of arbitrary arrest and detention that resulted from online activism and criticism of the Government. According to the source, the Government relied on Mr. Hào's history of

activism, including the writing and publishing of articles, to secure his conviction under article 79 of the Criminal Code for taking actions "aimed at overthrowing the people's administration". In criticizing the Government, Mr. Hào was exercising his right to freedom of expression, which is to be afforded particularly high protection under article 19 (2) of the Covenant. His arrest, detention, conviction and sentencing constitute a direct restriction on his right to freedom of expression.

18. The source argues that any restriction imposed on freedom of expression must satisfy the requirements of article 19 (3) of the Covenant. Article 79 of the Criminal Code is not formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly. This provision criminalizes any action that may be deemed to be "aimed at overthrowing" the Government, and is, therefore, excessively vague. The source notes that article 79 of the Criminal Code has been directly criticized on this basis by civil society and by the Working Group on Arbitrary Detention. Furthermore, the vague nature of article 79 effectively confers unfettered discretion on those responsible for applying the provision. The source asserts that the first requirement of article 19 (3) of the Covenant, namely that the restriction must be provided by law, has not been satisfied.

19. In addition, the source claims that the arrest, detention and conviction of Mr. Hào were not carried out in the pursuit of any legitimate aim, as required by article 19 (3) of the Covenant, and that the measures adopted are unnecessary and disproportionate. The source recalls that the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has stated that restrictions on political debate and expressions of dissent are not permissible under the Covenant (see A/HRC/14/23, para. 81 (i)). In paragraph 42 of its general comment No. 34 (2011) on the freedoms of opinion and expression, the Human Rights Committee has stated that imposition of penalties on a journalist solely for being critical of the government or the political social system espoused by the government can never be considered to be a necessary restriction of freedom of expression. The source asserts that it is precisely because of his expressions of dissent that Mr. Hào was arrested, detained and sentenced.

20. Mr. Hào has been sentenced to 15 years' imprisonment, with a further 5 years of house arrest. The source asserts that the imposition of such a severe penalty is disproportionate, given that the Vietnamese courts conceded that Mr. Hào's activities were of a non-violent nature. Moreover, the courts explicitly stated in their judgments that Mr. Hào was penalized for having defamed the leaders of Viet Nam. In paragraph 47 of its general comment No. 34 (2011), the Human Rights Committee states that imprisonment is never an appropriate penalty in defamation cases. Mr. Hào's arrest, detention, conviction and sentence thus fail to satisfy the requirements of article 19 (3) of the Covenant.

21. The source submits that Mr. Hào was arrested, detained and sentenced for his association with civil society and pro-democracy organizations. For example, purported evidence of his connections with peaceful organizations such as Bloc 8406 and the Republic of Viet Nam Government in Exile were key reasons for his conviction. This evidence included a request for Mr. Hào's details in order to register him as an official member of Bloc 8406. According to the source, these facts demonstrate that Mr. Hào's detention was intended to serve as a restriction on his right to freedom of association, and is part of an ongoing pattern of arbitrary detention of associates of opposition groups within Viet Nam. The source presented similar arguments to those outlined above in relation to article 19 (3) of the Covenant, as to why the permissible restrictions on freedom of association found in article 22 of the Covenant do not apply in the present case.

22. The source submits that the authorities have targeted Mr. Hào due to his communication of political opinions on matters of public interest, particularly those that were critical of the Government. Mr. Hào has also been targeted for his association with civil society and pro-democracy organizations, such as Bloc 8406, which advocate for political reform in Viet Nam. By arresting and detaining Mr. Hào, the authorities have violated his right as a citizen to take part in the conduct of public affairs under article 21 of the Universal Declaration of Human Rights and article 25 of the Covenant.

23. In relation to category III, the source points to several instances of the non-observance of Mr. Hào's right to a fair and public hearing, as guaranteed under articles 10

and 11 of the Universal Declaration of Human Rights and article 14 of the Covenant. These include:

(a) The right to a public hearing. The public was denied access to both Mr. Hão's trial and appeal hearings. Only his family was permitted entry, and the courthouse was surrounded by police to prevent public attendance. The exclusion of the public from a hearing is only justifiable when there are concerns about national security, public morals, public order, privacy or where publicity would be prejudicial to the interests of justice. Mr. Hão's case does not fall within any of these exceptions. The information presented during the trial would not have posed any concerns relating to national security, public morals, public order or privacy, nor would publicity have been prejudicial to Mr. Hão. Mr. Hão's right to a public hearing under article 14 (1) of the Covenant was therefore violated;

(b) The right to an independent and impartial tribunal. Throughout the hearing, Mr. Hão was denied the opportunity to address the court or to fully respond to questions. He was also prevented from cross-examining witnesses against him and from calling witnesses in his defence. These restrictions could not have appeared impartial to a reasonable observer and amount to a violation of the right to an impartial hearing under article 10 of the Universal Declaration of Human Rights and article 14 (1) of the Covenant;

(c) The presumption of innocence. The trial judge took only 45 minutes to deliberate before convicting Mr. Hão and sentencing him to 15 years' imprisonment with a further 5 years of house arrest. This suggests that Mr. Hão's guilt had been determined prior to the hearing, and his treatment violates the presumption of innocence guaranteed by article 11 of the Universal Declaration of Human Rights and article 14 (2) of the Covenant;

(d) Procedural guarantees required for a fair trial. Article 14 (3) of the Covenant requires accused persons to be afforded certain procedural guarantees in order to secure the right to a fair trial. These guarantees are also found in article 11 of the Universal Declaration of Human Rights, principle 18 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and principle 7 of the Basic Principles on the Role of Lawyers. Mr. Hão's right to be informed of the charges against him has been violated, as no arrest warrant was provided to his family at the time of his arrest. Moreover, his family was notified of the trial date only a week in advance, an extraordinarily short period that prevented Mr. Hão from appointing a lawyer of his own choosing and denied him adequate time to prepare his defence. Adequate facilities include access to all materials that the prosecution plans to offer in court against the accused. Since an arrest warrant was not provided at the time of arrest, Mr. Hão did not possess adequate information to begin preparing his defence;

(e) The right to trial without undue delay. Mr. Hão was arrested on 8 February 2013 and held in prison for seven months until his trial on 11 September 2013, in violation of his right to be tried without undue delay under article 14 (3) (c) of the Covenant;

(f) The right to examine witnesses. Throughout the hearing, Mr. Hão was prevented from cross-examining and summoning witnesses, in violation of article 14 (3) (e) of the Covenant. He was not permitted to address the court and was allowed to give only yes/no responses, which is a further violation of his right to prepare and present his defence under article 14 (3) of the Covenant;

(g) The right not to be compelled to testify against oneself or to confess guilt. Mr. Hão's procedural rights were also violated by confessional evidence used against him that was extracted through ill-treatment by the police. Mr. Hão gave a confession only after the police removed his clothes and continuously poured cold water onto his body. This treatment violates articles 7 and 14 (3) (g) of the Covenant.

24. The source asserts that Mr. Hão's pretrial and ongoing detention violate the Body of Principles, particularly principles 15, 19 and 20. During Mr. Hão's pretrial detention and for the first 17 months of his post-trial detention, his family was only permitted to visit him on a monthly basis, in violation of principle 15. Furthermore, on 9 February 2015, Mr. Hão was transferred to a detention centre 300 km from his home, and this has significantly hindered visitation. Mr. Hão has been denied his right to be visited by his family and to reside near his home, contrary to principle 20 of the Body of Principles.

*Communication from special procedure mandate holders*

25. Mr. Hào was the subject of a joint urgent appeal addressed to the Government on 17 April 2014 by several special procedure mandate holders.[1] The Working Group acknowledges the Government's reply dated 15 July 2014.[2]

*Response from the Government to the regular communication*

26. On 1 February 2018, the Working Group transmitted the allegations from the source to the Government under its regular communication procedure. The Working Group requested the Government to provide detailed information by 3 April 2018 about Mr. Hào's current situation. The Working Group also requested the Government to clarify the legal provisions justifying his continued detention, and its compatibility with the obligations of Viet Nam under international human rights law. Moreover, the Working Group called upon the Government to ensure the physical and mental integrity of Mr. Hào.

27. On 29 March 2018, the Government requested a one-month extension of the deadline for response. The Government replied to the regular communication on 24 April 2018.

28. In its response, the Government notes that, during the period 2008–2012, Mr. Hào wrote, amassed and disseminated a number of articles aimed at distorting information, defaming the State and inciting people to overthrow the Government. On 20 December 2012, the authorities carried out a search at Mr. Hào's residence, discovering and confiscating 108 document folders concerning his activities against national security.

29. On the basis of the evidence collected, on 7 February 2013, the police opened criminal proceedings against Mr. Hào, charging him with taking actions "aimed at overthrowing the people's administration" under article 79 of the Criminal Code. On 8 February 2013, the police of Phu Yen arrested Mr. Hào for the purpose of investigation.

30. Upon completion of the investigation, the police found that Mr. Hào was a member of the Republic of Viet Nam Government in Exile organization, tasked with preparing human resources and means for this organization to carry out its activities in Viet Nam aimed at overthrowing the Government by violence. Mr. Hào received funding from this organization to perform his assigned tasks, a total of USD 1,500 and 12 million dong by the time of his arrest.

31. The arrest, search and investigation relating to Mr. Hào were carried out following the issue of an arrest warrant, a search warrant and an investigation decision by the competent authority, approved by the competent People's Procuracies, which also supervised the enforcement of such warrants and decision to ensure that the process was in compliance with applicable laws and regulations.

32. On 11 September 2013, the People's Court of Phu Yen Province heard the case and sentenced Mr. Hào to 15 years' imprisonment and 5 years of probation under article 79 of the Criminal Code for the offence of taking actions "aimed at overthrowing the people's administration". On 23 December 2013, the Court of Appeal of the Supreme People's Court, based at Da Nang, heard the case and upheld the first instance sentence. Cooperation by Mr. Hào during the investigation phase, including providing further information and handing in relevant documents, was considered a mitigating factor by the Court when it decided on his sentence.

33. The first instance and appellate trials were public, and were carried out in accordance with applicable laws, including the Criminal Procedure Code. Mr. Hào's family was present at both trials. At the first instance trial, Mr. Hào refused to let his lawyer act as

[1] The urgent appeal was sent by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Special Rapporteur on freedom of religion or belief, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, the Special Rapporteur on the situation of human rights defenders, and the Special Rapporteur on the independence of judges and lawyers. Available at https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=19055.

[2] Available at https://spcommreports.ohchr.org/TMResultsBase/DownLoadFile?gId=74605.

his defence counsel. However, due to the nature of the case and in compliance with the Law on the Organization of People's Courts, the trial panel decided to keep this lawyer as his counsel. At this trial, Mr. Hào pleaded guilty. He had a different defence counsel during the appellate trial.

34. Mr. Hào is currently being held at An Diem Detention Centre, Quang Nam Province. His rights under national legislation have been fully respected, including during his arrest, detention, trial and custody. The detention conditions and treatment of Mr. Hào comply with the national legislation on meals, clothing, accommodation, daily life and health care for inmates.[3] Doctors at the Detention Centre assessed the health of Mr. Hào. Mr. Hào was supplied with appropriate medicines and exempted from carrying out labour. His health is normal. He is allowed to read newspapers and watch television every day, to communicate with his family and to receive visits and supplies from them, as provided for by law.

35. The State of Viet Nam respects and implements all measures to ensure the rights of the people of Viet Nam to freedom of expression, freedom of the press and freedom of access to information. Article 25 of the 2013 Constitution stipulates that citizens have the rights to freedom of expression, of the press, of access to information, of assembly and of association, and the right to demonstrate. The exercise of these rights is to be prescribed by law. These provisions are further elaborated on in the Law on the Press, the Law on Publishing, the Law on Information Technology, the Law on Access to Information and the governmental decrees detailing a number of the provisions of those Laws.

**Discussion**

36. The Working Group thanks the source and the Government for their submissions. The Working Group appreciates the cooperation and engagement of both parties in the present matter.

37. In determining whether Mr. Hào's deprivation of liberty is arbitrary, the Working Group has regard to the principles established in its jurisprudence to deal with evidentiary issues. If the source has presented a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations. The Government can meet this burden of proof by producing documentary evidence in support of its claims.[4] Mere assertions by the Government that lawful procedures have been followed are not sufficient to rebut the source's allegations (see A/HRC/19/57, para. 68).

38. In the present case, the Working Group finds that the source has established a credible prima facie case. The source has provided the original texts and translations of Mr. Hào's online articles, his petition to the President to assist victims of land disputes, the record of the search of his home on 20 December 2012, the judgment of the People's Court of Phú Yên Province at first instance, and the appeal judgment. These documents confirm many of the facts, dates and events leading up to Mr. Hào's arrest and detention and lend credibility to the source's case. The response of the Government also confirms the source's allegations in some respects. This includes the fact, agreed on by both parties, that Mr. Hào

[3] See the Law on Execution of Criminal Judgments of 2010, sect. 2 on the regimes regarding meals, clothing, accommodation, daily life and health care for inmates, decree No. 117/2011/ND-CP dated 15 December 2011 regulating the management of inmates and prison regimes regarding meals, clothing, accommodation, daily life and health care, and decree No. 90/2015/ND-CP dated 13 October 2015 amending and supplementing a number of provisions of decree No. 117/2011/ND-CP.

[4] See opinion No. 41/2013, in which it is noted that the source of a communication and the Government do not always have equal access to the evidence, and frequently the Government alone has the relevant information. In that case, the Working Group recalled that, where it is alleged that a person has not been afforded, by a public authority, certain procedural guarantees to which he or she was entitled, the burden to prove the negative fact asserted by the applicant is on the public authority, because the latter is "generally able to demonstrate that it has followed the appropriate procedures and applied the guarantees required by law ... by producing documentary evidence of the actions that were carried out". *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010*, p. 639, at para. 55, p. 661.

was convicted under article 79 of the Criminal Code for taking actions "aimed at overthrowing the people's administration".

39. The source alleges that a warrant was not produced by the State party's authorities on two separate occasions prior to and during Mr. Hào's arrest. First, on 20 December 2012, the police and inspectors from the Department of Information and Communication searched Mr. Hào's home and computer without a search warrant. Notably, this search produced material that was used as evidence to convict Mr. Hào at his trial on 11 September 2013, and was relied upon by the Supreme People's Court in rejecting his appeal on 23 December 2013. Second, after having been invited to a police station in Tuy Hòa City for questioning, Mr. Hào was arrested on 8 February 2013 without an arrest warrant or other decision by a public authority. The Government could have challenged these allegations by presenting evidence showing the times and dates of issue of the warrants, but did not do so. Accordingly, the Working Group finds that Mr. Hào's home and computer were searched without a search warrant, and Mr. Hào was arrested without an arrest warrant.

40. The Working Group recalls that, according to article 9 (1) of the Covenant, no one shall be deprived of his or her liberty except on such grounds and in accordance with such procedure as are established by law. Therefore, for deprivation of liberty to be considered lawful and not arbitrary, established legal procedures and guarantees must be respected. In the present case, evidence was obtained without following legal procedures. Moreover, Mr. Hào was arrested without being informed at that time of the reasons for his arrest, in violation of article 9 (2) of the Covenant. As the Working Group has stated, in order for a deprivation of liberty to have a legal basis, it is not sufficient for there to be a law authorizing the arrest. The authorities must invoke that legal basis and apply it to the circumstances of the case through an arrest warrant (see, for example, opinions No. 75/2017 and No. 46/2017).

41. The Working Group concludes that the Government has not taken the necessary steps to establish a legal basis for Mr. Hào's detention. Mr. Hào's deprivation of liberty is therefore arbitrary under category I.

42. The source alleges that Mr. Hào has been deprived of his liberty solely for exercising his rights under the Universal Declaration of Human Rights and the Covenant. In its response, the Government states that Mr. Hào was arrested and detained because he had planned and carried out activities with the aim of overthrowing the Government. As the Working Group has repeatedly stated in its jurisprudence, even when the detention of a person is carried out in conformity with national legislation, the Working Group must ensure that the detention is also consistent with the relevant provisions of international law (see, for example, opinions No. 79/2017, No. 75/2017, No. 42/2012, No. 46/2011 and No. 13/2007).

43. The Working Group notes that Mr. Hào was charged and convicted under article 79 of the Criminal Code, which provides that those who carry out activities, or establish or join organizations with the intention of overthrowing the people's administration are to be subject to the following penalties: (a) organizers, instigators and active participants, or those who cause serious consequences, are to be sentenced to 12–20 years' imprisonment, life imprisonment or capital punishment; (b) other accomplices are to be subject to 5–15 years' imprisonment.

44. The Working Group has considered the application of national security and public order provisions of the Criminal Code in Viet Nam on numerous occasions, including article 79 of the Criminal Code.[5] In those cases, the Working Group found that article 79 is so vague and overly broad that it could result in penalties being imposed on individuals who had merely exercised their rights under international law. The Working Group also

[5] See, e.g., opinions No. 35/2018, No. 40/2016, No. 26/2013, No. 27/2012 and No. 46/2011 in relation to article 79 of the Criminal Code. The Working Group understands that the Criminal Code was amended in November 2015, and that, despite some renumbering of provisions, the content of article 79 remains the same.

pointed out in those cases that the Government did not provide evidence of any violent action on the part of the petitioners, and that, in the absence of such information, the charges and convictions under article 79 could not be regarded as consistent with the Universal Declaration of Human Rights or the Covenant. The Working Group came to a similar conclusion in its report following a visit to Viet Nam in October 1994, noting that vague and imprecise national security offences did not distinguish between violent acts capable of threatening national security and the peaceful exercise of fundamental freedoms. It requested the Government to amend its laws in order to clearly define offences relating to national security and to state what was prohibited without any ambiguity (see E/CN.4/1995/31/Add.4, paras. 58–60 and 77).

45. In the present case, the Government did not submit any evidence to demonstrate that Mr. Hào's activities as a human rights defender and blogger were violent, or that he had incited others to commit acts of violence. Mere assertions that Mr. Hào had been involved in activities to overthrow the Government by violence are not sufficient, particularly when compared to the detailed case and information presented by the source. Indeed, as the source points out, in its judgments at first instance and on appeal, the People's Court acknowledged that Mr. Hào's activities were carried out in "non-violent form". Moreover, the Working Group considers that it is no coincidence that Mr. Hào's home was searched within three days of his posting a blog post that was particularly critical of the Communist regime. The Working Group recalls that the holding and expressing of opinions, including those which are critical of, or not in line with, official government policy, are protected under international human rights law. Mr. Hào's arrest and detention was clearly linked to the exercise of his rights under international law.

46. Accordingly, the Working Group considers that Mr. Hào's activities in blogging and calling for democratic reform fall within the boundaries of the freedom of expression protected by article 19 of the Universal Declaration of Human Rights and article 19 of the Covenant.[6] Similarly, the Working Group finds that, by associating with civil society and pro-democracy organizations in his efforts to bring democratic reform to Viet Nam, Mr. Hào was exercising his right to freedom of association under article 20 of the Universal Declaration of Human Rights and article 22 of the Covenant.[7] The Working Group is also of the view that Mr. Hào was engaging in advocacy relating directly to the political system in Viet Nam, and was deprived of his liberty as a result of exercising his right to take part in the conduct of public affairs under article 21 of the Universal Declaration of Human Rights and article 25 of the Covenant.[8]

47. The permitted restrictions on the freedoms of expression and association and on the right to take part in the conduct of public affairs under articles 19 (3), 22 (2) and 25 of the Covenant do not apply in the present case. The Government did not present any evidence to the Working Group to demonstrate how Mr. Hào's activities as a blogger and human rights defender were aimed at overthrowing the people's administration, nor why bringing charges under article 79 of the Criminal Code was a legitimate, necessary and proportionate response to his activities. In any event, in its resolution 12/16, the Human Rights Council calls on States to refrain from imposing restrictions that are not consistent with international human rights law, including restrictions on: discussion of government policies and political debate; reporting on human rights; peaceful demonstrations; and expression of opinion and

[6] The Working Group has found in several cases concerning Viet Nam that blogging and publishing material online fall within the right to freedom of expression under international law. See, e.g. opinions Nos. 75/2017, 27/2017, 26/2017, 33/2013, 26/2013, 27/2012, 1/2009, 13/2007, 19/2004, 20/2003 and 1/2003.

[7] The Working Group has also confirmed in cases relating to Viet Nam that the arrest and detention of individuals because of their association with pro-democracy groups is arbitrary. See, e.g., opinions No. 42/2012 and No. 6/2010.

[8] In paragraph 8 of its general comment No. 25 (1996) on participation in public affairs and the right to vote, the Human Rights Committee states that citizens may take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives, or through their capacity to organize themselves. See also opinions No. 40/2016, No. 26/2013, No. 42/2012, No. 46/2011 and No. 13/2007.

dissent. Moreover, in paragraph 23 of its general comment No. 34 (2011) on the freedoms of opinion and expression, the Human Rights Committee affirms that States parties should put in place effective measures to protect against attacks aimed at silencing those exercising their right to freedom of expression. Paragraph 3 may never be invoked as a justification for the muzzling of any advocacy of multi-party democracy, democratic tenets and human rights. Nor, under any circumstance, can an attack on a person, because of the exercise of his or her freedom of opinion or expression, including such forms of attack as arbitrary arrest, torture, threats to life and killing, be compatible with article 19.

48. In addition to the Working Group's findings, there is widespread concern in the international community about the use of national security legislation in Viet Nam to restrict the exercise of human rights, in particular the rights to freedom of expression and opinion. That concern is reflected in at least 34 of the recommendations contained in the 2014 report of the Working Group on the Universal Periodic Review of Viet Nam, several of which relate to the review and repeal of vague national security offences in the Criminal Code (including art. 79), the release of political prisoners and protection of human rights defenders, and the need for Viet Nam to implement the opinions of the Working Group on Arbitrary Detention.[9]

49. According to articles 1, 5 (c) and 8 of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels, to communicate with non-governmental organizations, and to have effective access to participation in the conduct of public affairs.[10] The source's allegations demonstrate that Mr. Hào was detained for the exercise of his rights under the Declaration as a human rights defender. The Working Group has determined that detaining individuals on the basis of their activities as human rights defenders violates their right to equality before the law and equal protection of the law under article 7 of the Universal Declaration of Human Rights and article 26 of the Covenant.[11]

50. The Working Group concludes that Mr. Hào's deprivation of liberty resulted from the exercise of his rights to freedom of expression and association, and to take part in the conduct of public affairs, and was contrary to article 7 of the Universal Declaration of Human Rights and article 26 of the Covenant. His deprivation of liberty was therefore arbitrary and falls within category II. The Working Group refers this matter to the Special Rapporteurs on freedom of expression, and on the rights to freedom of peaceful assembly and of association.

51. As noted above, the Working Group considers that article 79 of the Criminal Code is so vague and overly broad that it could, as in the present case, result in penalties being imposed on individuals who had merely exercised their rights under international law. As the Working Group has previously stated, the principle of legality requires that laws be formulated with sufficient precision so that the individual can access and understand the law, and regulate his or her conduct accordingly.[12] In the present case, the application of vague and overly broad provisions adds weight to the Working Group's conclusion that Mr. Hào's deprivation of liberty falls within category II. Moreover, the Working Group considers that, in some circumstances, laws may be so vague and overly broad that it is impossible to invoke a legal basis justifying the deprivation of liberty.

[9] See A/HRC/26/6, paras. 143.4, 143.34, 143.115–118, 143.144–171 and 143.173.

[10] See also resolution 70/161, in which the General Assembly calls upon States to take concrete steps to prevent and put an end to the arbitrary arrest and detention of human rights defenders, and in this regard strongly urges the release of persons detained or imprisoned, in violation of the obligations and commitments of States under international human rights law, for exercising their human rights and fundamental freedoms.

[11] See, e.g., opinions No. 79/2017, No. 75/2017 and No. 26/2017.

[12] See, e.g., opinion No. 41/2017, paras. 98–101.

52. Given its finding that the deprivation of liberty of Mr. Hào was arbitrary under category II, the Working Group wishes to emphasize that no trial of Mr. Hào should have taken place. However, Mr. Hào was tried by the People's Court of Phú Yên Province on 11 September 2013, and the Working Group considers that his right to a fair trial was violated during that trial and during his appeal hearing on 23 December 2013.[13]

53. The source alleges that Mr. Hào's trial at first instance and his appeal hearing were not open to the public. In its response, the Government asserted that Mr. Hào's trial was open to the public, and that his wife and children were present along with other family members. However, the Government provided only a general denial of the source's allegations without further explanation or evidence, and the Working Group is convinced, on the basis of the credible case presented by the source, that the trial and appeal were not public. There is no evidence that any of the exceptions set out in article 14 (1) of the Covenant were used as grounds for barring the public from attending the trial and appeal hearings, or indeed that such exceptions were applicable in the present case. Mr. Hào did not receive a public hearing under article 10 of the Universal Declaration of Human Rights and article 14 (1) of the Covenant.

54. In the absence of an alternative explanation of the conduct of the trial court from the Government, the Working Group finds that Mr. Hào was not tried in an impartial manner. The Working Group makes this finding because Mr. Hào was denied the opportunity to address the court, to fully respond to questions, and to cross-examine and call witnesses, in accordance with the principle of equality of arms. This constitutes a violation of his right to an impartial tribunal under article 10 of the Universal Declaration of Human Rights and under article 14 (1) of the Covenant. This information also discloses a violation of Mr. Hào's right to call and examine witnesses under article 14 (3) (e) of the Covenant.

55. In addition, the trial judge took only 45 minutes to deliberate before convicting and sentencing Mr. Hào to 15 years' imprisonment, with a further 5 years of house arrest. A trial lasting only one day for a serious national security offence suggests that Mr. Hào's guilt had been determined prior to the hearing. Moreover, the source alleges, and the Government did not contest, that the courthouse was surrounded by police and that Mr. Hào was escorted into court by 30 uniformed police officers. As the Human Rights Committee states in paragraph 30 of its general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, defendants should not be presented to the court in a manner indicating that they may be dangerous criminals, as this undermines the presumption of innocence.[14] Mr. Hào was denied the presumption of innocence guaranteed by article 11 of the Universal Declaration of Human Rights and article 14 (2) of the Covenant.

56. The source alleges that Mr. Hào made a confession after the police removed his clothes and continuously poured cold water onto his body. The trial and appeal transcripts provided by the source indicate that this confessional evidence was used against Mr. Hào. The Working Group recalls that, in line with paragraph 41 of Human Rights Committee general comment No. 32, the burden is on the Government to prove that statements made by Mr. Hào were given freely, and it has not done so in the present case. Mr. Hào's treatment violates article 14 (3) (g) of the Covenant. The Working Group refers this matter to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

57. The source alleges that Mr. Hào was denied his right under the Body of Principles to contact with the outside world. In its response, the Government asserted that Mr. Hào can

[13] The Working Group takes note of the source's argument that Mr. Hào's family was notified of the trial date only a week in advance and was thus unable to appoint a lawyer. According to the source, despite the appointment of a State defence lawyer, Mr. Hào opted to represent himself due to being prevented from appointing a lawyer of his choice. However, the Working Group is not convinced that this amounts to a violation of Mr. Hào's rights in the present case, given that Mr. Hào was in detention for seven months prior to trial and had sufficient time to brief a lawyer within that period in preparing for trial.

[14] See also opinions No. 79/2017, para. 62, and No. 40/2016, para. 41.

communicate with, and receive visits and supplies from, his relatives. However, it did not explain why it was necessary to impose restrictions on Mr. Hào's visitation rights. During Mr. Hào's pretrial detention and for the first 17 months of his post-trial detention, his family was only permitted to visit him on a monthly basis. Moreover, on 9 February 2015, Mr. Hào was transferred to a detention centre 300 km from his home. The Working Group finds that these limitations on Mr. Hào's contact with his family violated his right to have contact with the outside world under principles 15, 19 and 20 of the Body of Principles and rules 43 (3), 58 and 59 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules). The Working Group considers that moving a 69-year-old man in poor health to a prison that is a substantial distance away from his home serves no purpose, other than imposing additional suffering on Mr. Hào and his family.

58. The Working Group concludes that these violations of the right to a fair trial are of such gravity as to give the deprivation of liberty of Mr. Hào an arbitrary character according to category III.

59. Furthermore, the Working Group considers that Mr. Hào was targeted because of his political or other opinion and due to his activities as a human rights defender. The source provided ample evidence of Mr. Hào's activities since 2008 defending the human rights of others and seeking democratic reform in Viet Nam through his blogs and other activities. The source also demonstrated a pattern of targeting Mr. Hào for his work, including the regular cautions he received from the police warning him against his activities as they were deemed to be "contrary to the interests of the State". Mr. Hào's disproportionately heavy sentence appears to have been imposed to send a message to human rights defenders that they must cease their work or face penalties. For these reasons, the Working Group finds that Mr. Hào was deprived of his liberty on discriminatory grounds, that is, due to his political or other opinion and due to his status as a human rights defender. His deprivation of liberty is arbitrary according to category V. The Working Group refers the present case to the Special Rapporteur on the situation of human rights defenders.

60. The Working Group wishes to express its grave concern about Mr. Hào's physical and mental health. The source reports, and the Government has not denied, that Mr. Hào has been subjected to ill-treatment during his detention and has already suffered a stroke. His physical and mental health have reportedly deteriorated rapidly due to a lack of access to proper medical treatment for his stomach ulcer, paralysis and hearing difficulties. In its response, the Government asserts that Mr. Hào is provided with adequate medicine, without providing any evidence. According to article 10 (1) of the Covenant and rules 1, 24 and 27 of the Nelson Mandela Rules, all persons deprived of their liberty must be treated with humanity and with respect for their inherent dignity, including enjoying the same standards of health care that are available in the community. The Working Group considers that there is no legitimate reason to continue to detain a 69-year-old man with significant health issues who has already served over five years of a lengthy sentence imposed contrary to his human rights, and to deprive him of the opportunity to live the remainder of his life with his family. The Working Group calls on the Government to immediately and unconditionally release Mr. Hào, and to ensure that he receives the necessary medical attention after his release.

61. The present case is one of several brought before the Working Group in recent years concerning the arbitrary deprivation of liberty of persons in Viet Nam.[15] The Working Group recalls that, under certain circumstances, widespread or systematic imprisonment or other severe deprivation of liberty in violation of fundamental rules of international law may constitute crimes against humanity.[16] The Working Group would welcome the opportunity to engage constructively with the Government to address issues such as the use of imprecise provisions of the Criminal Code to prosecute individuals for the peaceful exercise of their rights, which continues to result in the arbitrary deprivation of liberty in Viet Nam.

[15] See, e.g., opinions Nos. 35/2018, 79/2017, 75/2017, 27/2017, 26/2017, 40/2016, 46/2015, 45/2015, 33/2013, 26/2013, 42/2012, 27/2012, 46/2011, 24/2011, 6/2010 and 1/2009.

[16] See, e.g., opinion No. 47/2012, para. 22.

62. On 15 April 2015, the Working Group sent a request to the Government to undertake a country visit, as a follow-up to its earlier visit to Viet Nam in October 1994. In its response of 23 June 2015, the Government informed the Working Group that it planned to invite other special procedure mandate holders who had already requested to visit, but that it would consider issuing an invitation to the Working Group at an appropriate time. On 6 April 2017, the Working Group reiterated its request for a country visit, and awaits a positive response. Given that the human rights record of Viet Nam will be subject to review in January 2019 during the third cycle of the universal periodic review, an opportunity exists for the Government to enhance its cooperation with the special procedures of the Human Rights Council and to bring its laws into conformity with international human rights law.

**Disposition**

63. In the light of the foregoing, the Working Group renders the following opinion:

> The deprivation of liberty of Ngô Hào, being in contravention of articles 2, 7, 9, 10, 11 (1), 19, 20 and 21 (1) of the Universal Declaration of Human Rights and of articles 2 (1), 9, 14, 19, 22, 25 (a) and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II, III and V.

64. The Working Group requests the Government of Viet Nam to take the steps necessary to remedy the situation of Mr. Hào without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

65. The Working Group considers that, taking into account all the circumstances of the case, in particular the risk of harm to Mr. Hào's health, the appropriate remedy would be to release Mr. Hào immediately and accord him an enforceable right to compensation and other reparations, in accordance with international law.

66. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Mr. Hào and to take appropriate measures against those responsible for the violation of his rights.

67. The Working Group requests the Government to bring its laws, including any equivalent of article 79 in the revised Criminal Code, into conformity with the recommendations made in the present opinion and with the commitments made by Viet Nam under international human rights law.

68. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteurs on freedom of expression, on freedom of peaceful assembly and of association, on human rights defenders, and on torture.

69. The Working Group encourages the Government to incorporate the Model Law for the Recognition and Protection of Human Rights Defenders into its domestic legislation and to ensure its implementation.[17]

**Follow-up procedure**

70. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

(a) Whether Mr. Hào has been released and, if so, on what date;

(b) Whether compensation or other reparations have been made to Mr. Hào;

(c) Whether an investigation has been conducted into the violation of Mr. Hào's rights and, if so, the outcome of the investigation;

[17] The Model Law was developed in consultation with more than 500 human rights defenders from around the world and 27 human rights experts. Available at www.ishr.ch/sites/default/files/documents/model_law_full_digital_updated_15june2016.pdf.

(d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Viet Nam with its international obligations in line with the present opinion;

(e) Whether any other action has been taken to implement the present opinion.

71. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example, through a visit by the Working Group.

72. The Working Group requests the source and the Government to provide the above information within six months of the date of the transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

73. The Government should disseminate through all available means the present opinion among all stakeholders.

74. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.[18]

[*Adopted on 26 April 2018*]

[18] See Human Rights Council Resolution 33/30, paras. 3 and 7.

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**Human Rights Council**
**Working Group on Arbitrary Detention**

# Opinions adopted by the Working Group on Arbitrary Detention at its eighty-first session, 17–26 April 2018

## Opinion No. 37/2018 concerning a minor whose name is known by the Working Group (Malaysia)*

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 33/30.

2. In accordance with its methods of work (A/HRC/36/38), on 18 December 2017, the Working Group transmitted to the Government of Malaysia a communication concerning a minor (whose name is known by the Working Group). The Government submitted a late response to the communication on 7 March 2018. Malaysia is not a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language,

* Setondji Roland Adjovi did not participate in the discussion of the present case.

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religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

**Submissions**

*Communication from the source*

4. The minor, whose name is known by the Working Group, is a 17-year-old Malaysian national. The minor was 16 years of age at the time of his arrest in February 2017.

5. On 6 February 2017, the minor was arrested, together with several other individuals, by police officers from a subdivision of the police headquarters in Northern Klang, Malaysia. According to the source, the police officers did not disclose the reasons for the minor's arrest. Nonetheless, the source notes that the probable reason could be that the minor had been in a vehicle suspected to have been used in a robbery.

6. On 8 February 2017, one of the persons arrested with the minor died in detention. According to the source, this individual had suffered significant injuries and displayed clear signs of poor health during his remand hearing. The source alleges that the Royal Malaysian Police failed to comply with a magistrate judge's order that the individual receive treatment at a hospital. The source further claims that the minor witnessed the alleged abuse suffered by the deceased individual. The minor was also a witness to the subsequent investigation by the Enforcement Agency Integrity Commission.

7. According to the source, the minor also suffered torture and ill-treatment while in custody. The source alleges that police officers kicked and punched the robbery suspects, including the minor, during the interrogation process. This allegedly involved the police officers beating them with bamboo sticks and pipes, including while they were hung upside-down.

8. The minor was remanded until 14 February 2017, when he was released from custody. He was later re-arrested and remanded at the police headquarters in Banting, Malaysia, until 17 February 2017. The source alleges that the minor was again abused and tortured during that period.

9. On 17 February 2017, the police applied for the minor's remand to be extended. However, the request was rejected on the basis of the minor's injuries. That day, the minor's family lodged a report at the Banting police station.

10. The source alleges that, upon his release, the minor was immediately rearrested by a police officer from the Southern Klang police station and was remanded until 21 February 2017. On 21 February 2017, the minor was remanded for a further four days on the grounds that he could provide assistance in the enquiries into the death of the person he was arrested with on 6 February 2017. That day, the minor's family lodged a second report, this time at the Klang police station.

11. On 25 February 2017, the minor was released and returned to his family. The source reports that a medical examination revealed that the minor had a bleeding nose, wounds, swollen face and feet and bloodshot eyes, which the source alleges were caused by the physical abuse of the minor.

12. On 4 April 2017, the minor was with two friends when the police apprehended them on suspicion that they had committed theft. During their trial, the minor's two friends pleaded guilty to the charges and were sentenced to four months' imprisonment. According to the source, the minor went ahead with his trial and was held in pretrial detention because his family was reluctant to pay bail due to concerns that he may be re-arrested.

13. On 10 September 2017, the minor's family lodged a third report, this time at the Enforcement Agency Integrity Commission, regarding the abuse allegedly suffered by the minor, and in relation to the minor's "chain remand", which source states is a practice involving the re-arresting of an individual at the conclusion of his or her initial remand period in accordance with the Criminal Procedure Code. According to the source,

individuals are usually re-arrested by officers from another police station for a similar crime. They are then subject to new remand orders on the basis of new investigations. In some cases, individuals have been known to be under "chain remand" for up to 80 days.

14. On 13 September 2017, the minor's lawyer advised him to plead guilty to the case against him involving items stolen during the alleged theft in April 2017, as he said he would be released, having technically served his time during the remand period. Upon his release, however, the minor was re-arrested on the same day and brought to the Klang Selatan police station. On 14 September 2017, the minor was taken to the Shah Alam Court for his remand hearing.

15. According to the source, the investigating officer from the Organized Crime Division explained that the minor had been arrested under the 1959 Prevention of Crime Act and would be detained for 21 days for investigation. The source reports that the Act gives the Police the power to detain an individual without trial for a period of 60 days. At the conclusion of the 60-day detention period, the case file is submitted to the Crime Prevention Board, which evaluates the case and determines a sentence. The individual is then released unconditionally, subject to a supervision order with an electronic monitoring device for a period of no more than five years, or subject to a detention order for no more than two years. The terms of the sentence can be extended by the Board at the conclusion of each sentence without judicial review.

16. On 21 September 2017, the minor's lawyer retracted his client's guilty plea in relation to the theft case and proceeded to trial. The Court ordered the minor to be presented in court on 10 October 2017.

17. On 9 November 2017, the minor was sentenced by the Crime Prevention Board under section 15 (1) of the 1959 Prevention of Crime Act to police supervision and house arrest. According to the source, the minor is now required to reside in the locality of Mukim Tanjong Dua Belas and cannot leave unless he obtains the written approval of the Selangor Chief of Police. The minor was also fitted with an electronic monitoring device and is required to report to Banting police station every Monday and Thursday for the first two years of his sentence.

18. The source submits that the detention of the minor was arbitrary under category III. The source argues that the minor was not afforded his right to be heard by the Court For Children with regard to the allegations against him, contrary to the Convention on the Rights of the Child and reflected in section 83 of the 2001 Child Act. Moreover, the source submits that the minor's detention under the 1959 Prevention of Crime Act violated his right to a fair trial, as he was not given any opportunity to be heard by a judicial body and not offered legal representation when the panel sentenced him to house arrest. The source adds that there are currently 142 minors in detention under the 1959 Prevention of Crime Act.

*Response from the Government to the regular communication*

19. On 18 December 2017, the Working Group transmitted the allegations from the source to the Government under its regular communication procedure. The Working Group requested the Government to provide detailed information by 19 February 2018 about the minor's detention, including any comment on the source's allegations. The Working Group also requested the Government to clarify the factual and legal grounds invoked to justify the minor's detention, as well as their compatibility with international human rights norms.

20. On 16 February 2018, the Government requested an extension of the deadline for response. The extension was granted with a new deadline set at 5 March 2018. The Government replied to the regular communication on 7 March 2018.

21. The response in the present case is therefore considered late, and the Working Group cannot accept the response as if it was presented within the time limit. The source provided the Working Group with further information and clarifications on 22 March 2018.

**Discussion**

22. In the absence of a timely response from the Government, as indicated in paragraphs 15 and 16 of its methods of work, and in conformity with its practice, the Working Group considered all the relevant information that it has obtained in order to render this opinion.

23. The Working Group is aware that there were two separate legal proceedings initiated against the minor:

(a) The minor was initially detained to assist in investigations pursuant to several police reports, which had been lodged for various offences under the Penal Code, such as rape, armed gang-robbery, housebreaking, theft of a motor vehicle, and other theft. The minor was subsequently detained under the 1959 Prevention of Crime Act, and a supervision order was issued against him (hereafter, the first proceedings);

(b) On 9 April 2017, the minor and two adults were charged with committing an offence of theft with common intention, with an alternative charge under the Penal Code of committing an offence of dishonestly receiving stolen property. The matter was heard before the Magistrates' Court. The minor pleaded guilty on 16 January 2018 and was ordered by the magistrate to be discharged on a good behaviour bond. The minor is to be accompanied by his parents in attending interactive workshops (hereafter, the second proceedings).

*Current situation of the minor*

24. A preliminary issue for the Working Group is whether the minor is currently detained. On 9 November 2017, the minor was placed under an order by the Crime Prevention Board of police supervision and house arrest. That order is in effect until 8 November 2019. According to the source, this means that the minor is required to reside in a certain locality and to obtain written approval before he leaves that locality. He is also required to wear an electronic monitoring device and to report to police.

25. As the Working Group recently stated, detention is not only a question of legal definition, but also of fact. If the person concerned is not at liberty to leave a place of detention, all the appropriate safeguards that are in place to guard against arbitrary detention must be respected (see A/HRC/36/37, para. 56). Moreover, in its jurisprudence, the Working Group has maintained that house arrest amounts to detention provided that it is carried out in closed premises which the person is not allowed to leave.[1] In determining whether this is the case, the Working Group considers whether there are limitations on the person's physical movements, on receiving visits from others and on various means of communication, as well as the level of security around the place where the person is allegedly detained.[2] In the present case, while the reporting and other conditions imposed on the minor are certainly restrictive, the conditions of house arrest are not met. The minor is not detained in closed premises which he is prevented from leaving. The Working Group is therefore of the view that the minor is not currently detained.

26. The Working Group welcomes the fact that the minor is no longer in detention. According to paragraph 17 (a) of its methods of work, the Working Group reserves the right to render an opinion on a case-by-case basis on whether a detention was arbitrary, notwithstanding the release of the person concerned. The Working Group considers that it is important to render an opinion, given that this case involves serious allegations that a minor has been repeatedly arrested and held on remand. In addition, the Working Group wishes to consider the alleged practice of "chain remand" in Malaysia, as well as the

[1] See, e.g., Opinion No. 13/2007, para. 24; and Deliberation No. 1 on House Arrest, E/CN.4/1993/24, para. 20.

[2] See, e.g., opinion No. 16/2011, in which an individual under house arrest could not meet with foreign diplomats, journalists or other visitors at her apartment, and her mobile telephone and the Internet had been cut off. She was not allowed to leave her apartment, except on short approved trips and under police escort, and the entrance to the compound was guarded by security agents (para. 7). See also Opinions Nos. 47/2006, 41/1993, 39/2013, 30/2012, 21/1992, 18/2005, 12/2010, 11/2005, 11/2001 and 4/2001.

allegation that the minor's detention under the 1959 Prevention of Crime Act does not meet international fair trial standards. In doing so, the Working Group emphasizes that its mandate does not involve consideration of whether the minor has committed any crime, and that its sole focus is whether the minor's previous periods of detention were in accordance with international human rights norms.

27. In determining whether the minor's detention was arbitrary, the Working Group has regard to the principles established in its jurisprudence to deal with evidentiary issues. If the source has presented a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations. The Government can meet this burden of proof by producing documentary evidence in support of its claims.[3] Mere assertions by the Government that lawful procedures have been followed are not sufficient to rebut the source's allegations (see A/HRC/19/57, para. 68).

28. According to the source, the minor was almost continuously detained in police custody from 6 to 25 February 2017, and again from 13 September to 9 November 2017 in relation to the first proceedings against him. The minor was also placed in pretrial detention from 4 April 2017 until his release on 13 September 2017 in relation to the second proceedings against him involving the alleged theft. The Working Group discusses each of these periods of detention in turn.

*Detention in relation to the first proceedings against the minor*

29. The source alleges that when the minor was initially arrested on 6 February 2017, the police officers did not disclose the reasons for his arrest. Instead, the minor was left to assume that the arrest related to the fact that he was in a vehicle suspected of having been used in a robbery. The Working Group was made aware of an arrest report (Bandar Baru Kelang 1368-1371/2017) filed after the minor's arrest on 6 February 2017, which reportedly indicated that the minor had been informed of the reasons for his arrest. However, on the basis of all the information and evidence available to it, the Working Group finds the submissions of the source to be more credible on this point.

30. On the basis of all the information available, the Working Group is convinced that the minor was arrested on 6 February 2017 without having been informed at that time of the reasons for his arrest, in violation of articles 9 and 10 of the Universal Declaration of Human Rights. Moreover, the minor was subsequently re-arrested on two occasions after his release on 14 and 17 February 2017, and there is no information or evidence to suggest that he was afforded his right to be informed of the reasons for his arrest on either of those two occasions.[4] The Working Group considers that informing all arrested persons of the reasons for their arrest is an essential procedural requirement that enables such persons to seek release if they believe that the reasons given are invalid or unfounded, and is necessary in establishing a legal basis for the detention.[5] The Working Group finds that the Government did not establish a legal basis for the minor's detention, which was therefore arbitrary under category I.

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[3] See opinion No. 41/2013, in which the Working Group notes that the source of a communication and the Government do not always have equal access to the evidence, and frequently the Government alone has the relevant information. In that case, the Working Group recalled that where it is alleged that a person has not been afforded, by a public authority, certain procedural guarantees to which he or she was entitled, the burden to prove the negative fact asserted by the applicant is on the public authority, because the latter is "generally able to demonstrate that it has followed the appropriate procedures and applied the guarantees required by law ... by producing documentary evidence of the actions that were carried out". See also *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, ICJ, Judgment, 30 November 2010, para. 55.

[4] The source suggests that the minor's remand was extended on 21 February 2017 for reasons related to the minor assisting in the enquiries into the death of the person he was arrested with on 6 February 2017, but this is far from an official reason provided at the time of arrest.

[5] The Working Group has previously found that when reasons are not provided for the detention of an individual, this constitutes a failure to establish a legal basis for the detention. See, e.g., opinions No. 67/2017, No. 46/2017 and No. 28/2016.

31. Furthermore, the source alleges that from 6 to 25 February 2017, the minor was subject to a practice known as "chain remand". According to the source, this practice involves the re-arresting of individuals at the conclusion of their initial remand period, usually by police officers from another police station, so that they are then subject to new remand orders. The minor in the present case was clearly subject to "chain remand", as he was immediately re-arrested following his releases on 14 and 17 February 2017 by officers from different police stations and held under new remand orders. The Government did not address the issue of "chain remand" in its late response.

32. The Working Group considers that, in effect, "chain remand" allows the police to detain a person for prolonged and indefinite periods by circumventing the time limits set out in the Criminal Procedure Code.[6] As the Working Group has found in its jurisprudence involving Malaysia, if the authorities have evidence that a crime has been committed, they must charge suspects rather than detaining them without trial.[7] The Working Group is of the view that "chain remand" is an abuse of power, as well as a violation of the right to liberty, freedom from arbitrary detention, and right to fair trial under articles 3, 9, 10 and 11 (1) of the Universal Declaration of Human Rights.

33. The Government acceded to the Convention on the Rights of the Child in 1995, but it has entered and maintains reservations in relation to certain articles of the Convention, discussed further below. By subjecting the minor to "chain remand", the Government's conduct may be assessed against the obligations found in articles 3 (1) and 40 (2) (b) (i) of the Convention to ensure that the best interests of the minor were a primary consideration, and to afford him the presumption of innocence by respecting his release from custody. The Working Group calls upon the Government to enact new laws and/or amend its existing legislation to prohibit the practice of "chain remand". It is also essential that the courts serve as a safeguard against this practice by conducting a substantive review of the lawfulness and necessity of detention, particularly when the authorities are seeking to hold a person under successive remand orders.

34. In addition, according to the information provided by the source, the minor was re-arrested on 13 September 2017 in relation to the first proceedings against him. The minor appears to have been in custody from 13 September 2017 until he was placed under a supervision order by the Crime Prevention Board on 9 November 2017.[8]

35. According to the source, the investigating officer from the Organized Crime Division stated that the minor had been arrested under the 1959 Prevention of Crime Act and would be detained for 21 days for investigation. The source reports that this Act gives the police the power to detain an individual without trial for a period of 60 days. At the conclusion of the 60-day detention period, the case file is submitted to the Crime Prevention Board, which determines the order. The Board has the power to order unconditional release, impose a supervision order for up to five years, or place an individual under a detention order for up to two years. The terms of the order can be extended by the Board at the conclusion of each order without judicial review.

36. The Working Group considers that the provisions of the Act that allow individuals to be detained without trial for 60 days violate the right to review of the lawfulness of the detention, as it appears that there is no review by a judicial body of the detention at any point during that 60-day period. As the Working Group has stated, the right to challenge the lawfulness of detention before a court is a self-standing human right, the absence of which

[6] According to the source, under section 117 (2) (a) and (b) of the Malaysian Criminal Procedure Code, individuals arrested for investigation of a serious crime can be remanded for a maximum of 14 days with an application for extension to be filed by the police after the conclusion of the first 7 days of remand. For other crimes, individuals can be remanded for a maximum of 7 days with an application for extension to be filed after the initial 4 days of remand.

[7] See, e.g., opinions No. 32/2008 and No. 4/1997.

[8] The source did not submit any information to suggest that the minor had been released at any stage between his re-arrest on 13 September 2017 and his placement under a supervision order on 9 November 2017.

constitutes a human rights violation.[9] The lack of judicial involvement continues during and after the making of orders, as the Crime Prevention Board is able to place individuals under detention orders and extend those orders without judicial review. The Working Group is of the view that the review of a case and determination of an order of detention or supervision by a non-judicial body does not satisfy minimum fair trial guarantees (see A/HRC/16/47/Add.2, para. 41). The Working Group finds that the minor's detention, hearing and placement under a supervision order pursuant to the 1959 Prevention of Crime Act was not in conformity with articles 10 and 11 (1) of the Universal Declaration of Human Rights. The minor's right to have his matter determined without delay by a competent, independent and impartial authority in a fair hearing is recognized under article 40 (2) (b) (iii) of the Convention on the Rights of the Child.

37. The Working Group takes note that the right to liberty is not absolute and may be subject to restrictions, in accordance with article 29 (2) of the Universal Declaration of Human Rights. The Working Group has also considered whether the 1959 Prevention of Crime Act strikes the balance between the guarantee of rights and freedoms and the necessity of securing respect for the rights of others and meeting the just requirements of morality, public order and the general welfare of a democratic society.

38. The Working Group has consistently held in its jurisprudence that, when a State invokes a restriction on the freedoms provided under international human rights law, it must demonstrate the precise nature of the threat and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the exercise of a right and the threat.[10] In the present case, there was no explanation of whether the minor was alleged to have committed any offence for which he had been placed under a supervision order, nor how the minor had posed any threat to the rights of others or to morality, public order and general welfare. Moreover, it was not clear why the minor had been detained and placed under a supervision order pursuant to 1959 Prevention of Crime Act, which provided for subversion and public order offences, when his initial detention had related to providing assistance on police reports lodged for various offences under the Penal Code.[11] The Working Group therefore finds that the necessity and proportionality of the minor's detention has not been established.

39. The source also argued that the minor was not offered legal representation when he appeared before the Crime Prevention Board. The Working Group is aware that legal representation was reported to be available throughout the procedure leading to the issuance of the supervision order, including during representations before the Board, in accordance with article 151 of the Federal Constitution of Malaysia. However, on the basis of all the information available to it, the Working Group finds the submissions of the source to be more credible on this point.

40. The Working Group recalls that, according to principle 9 and guideline 8 of the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, all detained persons have the right to legal assistance at any time during their detention, including at no cost if the person does not have adequate means to pay for counsel of his or her choice (paras. 12 and 68). The Working Group considers that the failure to provide the minor with adequate legal representation violated articles 10 and 11 (1) of the Universal Declaration of Human Rights. Moreover, according to articles 12 (2) and 40 (2) (b) (iii) of the Convention on the Rights of the Child, the Government is obliged to provide children with the opportunity to be heard in any judicial and administrative proceedings affecting them, either directly or through a legal representative. The lack of legal assistance was

[9] See United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, para. 2.

[10] See opinion No. 50/2017, para. 76. See also opinions No. 44/2014, para. 24; No. 29/2012, para. 28; and No. 25/2012, para. 57.

[11] According to the source, the 1959 Prevention of Crime Act is broad and has been used to curb terrorism and organized crime and to deal with repeat offenders in Malaysia. In practice, the Police and the Home Ministry have described it as a preventive law to prevent the occurrence of a crime or the proliferation of selected groups of criminals.

particularly serious in this case as it involved a minor and no judicial body was involved in the review. As the source noted in its further clarifications, there is a limited right to judicial review of the Crime Prevention Board's decision, as a challenge can only be brought when there is procedural impropriety involved in making the order.

41. For the above reasons, the Working Group is of the view that the violation of the minor's right to a fair trial during his initial detention and subsequent hearing by the Crime Prevention Board is of such gravity as to give his detention an arbitrary character under category III.

*Pretrial detention from 4 April to 13 September 2017 in the second proceedings against the minor*

42. The source alleges that on, 4 April 2017, the minor was with two friends when the police apprehended them on suspicion that they had committed theft. The minor's two friends pleaded guilty to the charges, but the minor appears to have been held in pretrial detention until 13 September 2017 when, on the advice of his lawyer, he pleaded guilty to the alleged theft of items and was released.[12] The minor pleaded guilty to theft on 16 January 2018 and was placed on a good-behaviour bond.[13]

43. The source argues that the minor was not afforded his right to be heard by the Court For Children with regard to the allegations against him, contrary to the Convention on the Rights of the Child, and reflected in section 83 of the 2001 Child Act. The source did not elaborate further on this argument. The Working Group is aware that the minor's second proceedings were dealt with by the Magistrates' Court and not in the Court For Children because he was charged with two adult offenders. Under those circumstances, section 83 (4) of the 2001 Child Act appears to require the matter to be heard outside the Court For Children. Although the minor was charged in a normal court, the procedures applied by the court and the sentence imposed on the minor appear to be consistent with the Child Act, and appear to have taken into account the best interests of the minor in accordance with the Convention on the Rights of the Child. Having taken into account all the information available to it on this issue, the Working Group considers that the trial of the minor in the Magistrates' Court does not amount to a violation of the right to fair trial of such gravity as to render the minor's pretrial detention arbitrary. The Working Group wishes to emphasize that this finding is particular to the present case, and that the trial of a minor by an ordinary court in other circumstances may amount to arbitrary detention.

*Other issues*

44. In addition, the Working Group takes note of the information provided by the source that there are currently some 142 minors in detention under the 1959 Prevention of Crime Act. While those minors were not the subject of the present case, the Working Group considers that their detention clearly falls within its mandate and wishes to provide its views in relation to their situation.

45. The Working Group was informed that the 1959 Prevention of Crime Act was enacted pursuant to a provision of the Federal Constitution of Malaysia that ensures its validity, notwithstanding other guarantees of rights and freedoms under the Constitution, and individuals detained under the Act have the right to file a writ of habeas corpus. However, as noted earlier, the Working Group considers the provisions of the Act that allow for detention without trial for 60 days to be in violation of international human rights norms, regardless of the Act's standing under domestic law. Moreover, the Working Group has previously stated that the remedy of habeas corpus cannot substitute for the universal

[12] The Working Group has explained the principles applicable to pretrial detention, including that it constitutes a grave limitation on the freedom of movement and must be exceptional. See A/HRC/19/57, paras. 48–58.

[13] There was no information to suggest that the minor had been detained in relation to the second proceedings against him between his release on 13 September 2017 and his sentencing in January 2018. In its further clarifications, the source confirmed that the minor had been on bail during that period.

right of any person suspected of the commission of an offence or crime to a fair and public hearing by an independent and impartial tribunal.[14]

46. The detention of minors is subject to article 37 of the Convention on the Rights of the Child.[15] The Working Group takes note that, on 19 July 2010, the Government entered reservations to the Convention on the Rights of the Child as follows:

> The Government of Malaysia accepts the provisions of the Convention on the Rights of the Child but expresses reservations with respect to articles 2, 7, 14, 28 paragraph 1 (a) and 37, of the Convention and declares that the said provisions shall be applicable only if they are in conformity with the Constitution, national laws and national policies of the Government of Malaysia.[16]

47. As noted earlier in the present opinion, there are also other provisions of the Convention that are relevant to the detention of minors but are not subject to reservations. These include the requirements that the best interests of the child be a primary consideration (art. 3 (1)); that the child be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative (art. 12 (2)); and protection of the child's procedural rights in any criminal matter (e.g. presumption of innocence, right to be notified promptly of charges, the right to appeal etc.) (art. 40 (2)). The Working Group calls upon the Government to ensure that the 142 minors in detention benefit from the provisions of the Convention, as well as from standards provided for in instruments such as the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) and the United Nations Rules for the Protection of Juveniles Deprived of Their Liberty.

48. In its voluntary pledges given prior to seeking membership of the Human Rights Council in 2017, the Government made a number of commitments to advancing the rights of children (see A/72/77, paras. 29–30). Although Malaysia was not successful in its candidacy for the Council, the Government has the opportunity to demonstrate that it is committed to this goal by withdrawing its reservations to the Convention on the Rights of the Child. According to the Human Rights Council in its resolution 5/1, these voluntary pledges will be taken into account in the next universal periodic review of Malaysia. Other States and United Nations treaty bodies have also urged the Government to withdraw its reservations to the Convention.[17]

49. Furthermore, the Working Group takes note that the Malaysian courts have determined that the Universal Declaration of Human Rights is not a legally binding instrument and only forms part of the municipal law of Malaysia to the extent that it is not inconsistent with the Federal Constitution of Malaysia and national legislation. The Working Group respectfully disagrees with that position, and refers to its previous remarks on this subject in paragraph 77 of its opinion No. 50/2017:

> … acceptance of this argument would allow States to override their international obligations simply by developing inconsistent national laws. Moreover, the prohibition of the arbitrary deprivation of liberty is of a universally binding nature under customary international law. When the Working Group has determined the deprivation of liberty to be arbitrary in its opinions adopted in relation to Malaysia,

[14] See opinion No. 32/2008, para. 45.

[15] Article 37 provides, inter alia, that: (a) no child shall be subjected to torture or other ill-treatment; (b) no child shall be deprived of his or her liberty unlawfully or arbitrarily, and arrest, detention or imprisonment of a child shall be a measure of last resort and for the shortest appropriate period of time; (c) every child deprived of his or her liberty shall be treated with humanity and respect for their inherent dignity and in a matter which takes into account their needs; and (d) every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

[16] See https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=_en.

[17] See report of the Working Group on the Universal Periodic Review of Malaysia, A/HRC/25/10, paras. 146.29, 146.32 and 146.34–146.35. See also CRC/C/MYS/CO/1, paras. 11–12 and 38–39.

it has consistently found a violation of the Universal Declaration of Human Rights and requested the Government to bring the situation of the detained person into conformity. In its resolution 5/1, the Human Rights Council established that the Universal Declaration is one of the instruments that forms the basis of the universal periodic review of States, including Malaysia.

50. In addition, the Working Group wishes to express its grave concern about the alleged torture and ill-treatment of the minor while he was in police custody. According to the source, the minor was physically abused on at least three occasions while he was in custody, that is, prior to his releases on 14 and 17 February 2017, and during his detention from 17 to 25 February 2017. The minor was allegedly kicked and punched during the interrogation process and beaten with bamboo sticks and pipes while hung upside down. Moreover, according to the source, a medical examination of the minor after his release on 25 February 2017 revealed injuries consistent with this account. The Working Group considers those allegations to be credible, given that it found torture and ill-treatment in police stations to be common during its visit to Malaysia in June 2010 (see A/HRC/16/47/Add.2, para. 50).

51. The Working Group is particularly concerned that the authorities were aware of these allegations, but do not appear to have acted on them. For example, the minor's family lodged two reports to the police on 17 and 21 February 2017, as well as one on 10 September 2017 to the Enforcement Agency Integrity Commission regarding the abuse allegedly suffered by the minor.[18] In addition, on 17 February 2017, an application by the police for the minor's remand to be extended was rejected on the basis of the minor's injuries, presumably by a magistrate tasked with reviewing the period of remand under the Criminal Procedure Code. Despite being made aware of these allegations, the police re-arrested and placed the minor in remand on 17 February 2017, where he was reportedly subjected to further abuse. Given the investigation into the death of one of the individuals arrested with the minor on 6 February 2017,[19] the Government should have ensured the safety of the minor in accordance with the Convention on the Rights of the Child. In the light of these allegations, the Working Group refers this case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

52. Finally, the Working Group would welcome the opportunity to work constructively with the Government to address the Working Group's concerns in relation to arbitrary detention in Malaysia. In April 2015, the Working Group sent a request to the Government to undertake a country visit, as a follow-up to its earlier visit to Malaysia in 2010, and looks forward to a positive response. Given that the human rights record of Malaysia will be subject to review during the third cycle of the universal periodic review in November 2018, an opportunity exists for the Government to enhance its cooperation with the special procedure mandate holders. In this context, the Working Group notes with appreciation that the Government has reiterated its readiness to work with the Working Group in addressing issues or cases that it brings to the attention of the Government, in line with the commitment of Malaysia to the promotion and protection of human rights.

**Disposition**

53. In the light of the foregoing, the Working Group renders the following opinion:

The detention of the minor from 6 to 25 February 2017 and from 13 September to 9 November 2017, being in contravention of articles 3, 9, 10 and 11 (1) of the Universal Declaration of Human Rights, is arbitrary and falls within categories I and III.

[18] The Working Group is aware that two reports were lodged with the police, and that the Government is closely monitoring ongoing police investigations into those reports. The Working Group is also aware that the source's family lodged a complaint with the Enforcement Agency Integrity Commission, which is gathering documents and evidence in order to conclude its investigation.

[19] An investigation was immediately carried out in relation to the death of this individual, and the case is now pending before a court.

54. The Working Group requests the Government of Malaysia to take the steps necessary to remedy the situation of the minor without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights. The Working Group urges the Government to accede to the International Covenant on Civil and Political Rights, and to withdraw all reservations to the Convention on the Rights of the Child.

55. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to accord the minor an enforceable right to compensation and other reparations for the period in which he was arbitrarily detained, in accordance with international law.

56. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary detention of the minor, including his numerous arrests on past occasions and alleged torture and ill-treatment while in police custody, and to take appropriate measures against those responsible for the violation of his rights.

57. The Working Group requests the Government to bring its laws, particularly the 1959 Prevention of Crime Act, into conformity with the recommendations made in the present opinion and with the obligations of Malaysia under international human rights law.

58. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers this case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, for appropriate action.

**Follow-up procedure**

59. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

(a) Whether compensation or other reparations have been made to the minor;

(b) Whether an investigation has been conducted into the violation of the minor's rights and, if so, the outcome of the investigation;

(c) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Malaysia with its international obligations in line with the present opinion;

(d) Whether any other action has been taken to implement the present opinion.

60. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example, through a visit by the Working Group.

61. The Working Group requests the source and the Government to provide the above information within six months of the date of the transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

62. The Government should disseminate through all available means the present opinion among all stakeholders.

63. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily detained, and to inform the Working Group of the steps they have taken.[20]

[*Adopted on 26 April 2018*]

[20] See Human Rights Council resolution 33/30, paras. 3 and 7.

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**Human Rights Council**
**Working Group on Arbitrary Detention**

# Opinions adopted by the Working Group on Arbitrary Detention at its eighty-first session, 17 to 26 April 2018

## Opinion No. 38/2018 concerning Mohammed Hamid Ali Abdullah Al Jabouri, Mohammed Nehme Abbas Mahmoud Al Jabouri, Ahmad Ali Najim Rsan Al Abadi, Omar Ali Najim Rsan Al Abadi, Uday Hafiz Abbas Ali Al Ali, Ali Adel AbdelKarim Ismail Al Hashemi, Mazen Ahmad Sattar Hasan Al Obaidi, Riad Abdullah Razik, Mohammad Shawki Saoud Rahim Al Kubaisi, Buraq Abdel Ilah Jassim Mohamad Al Habsh, Qusay Saeed Abed Abbas Al Mashhadani, Malik Abed Sultan Hamad, Mohammad Firas Bahr Shati, Hammad Zaidan Khalaf Al Fahdawi, Abdul Razak Abdul Rahman Hasan Al Dulaimi, Rafid Walid Rachid Majid Al Obaidi, Hicham Ali Nayef Shatr, Mustafa Mohammad AbdelKarim Salih Al Samurai Al Hasani, Ismail Nasif Jassim Al Mashhadani, Ali Moussa Hussein Al Ameri, Salam Ashour Khalil Ibrahim Al Jumaili, Qusay Obaid Ibrahim Salloum, Loay Obaid Ibrahim Salloum and Saad Alwan Hamadi Yassin Al Mashhadani (Iraq)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended it for a three-year period in its resolution 33/30.

2. In accordance with its methods of work (A/HRC/36/38), on 23 January 2018 the Working Group transmitted to the Government of Iraq a communication concerning Mohammed Hamid Ali Abdullah Al Jabouri, Mohammed Nehme Abbas Mahmoud Al Jabouri, Ahmad Ali Najim Rsan Al Abadi, Omar Ali Najim Rsan Al Abadi, Uday Hafiz Abbas Ali Al Ali, Ali Adel AbdelKarim Ismail Al Hashemi, Mazen Ahmad Sattar Hasan Al Obaidi, Riad Abdullah Razik, Mohammad Shawki Saoud Rahim Al Kubaisi, Buraq Abdel Ilah Jassim Mohamad Al Habsh, Qusay Saeed Abed Abbas Al Mashhadani, Malik Abed Sultan Hamad, Mohammad Firas Bahr Shati, Hammad Zaidan Khalaf Al Fahdawi, Abdul Razak Abdul Rahman Hasan Al Dulaimi, Rafid Walid Rachid Majid Al Obaidi, Hicham Ali Nayef Shatr, Mustafa Mohammad AbdelKarim Salih Al Samurai Al Hasani, Ismail Nasif Jassim Al Mashhadani, Ali Moussa Hussein Al Ameri, Salam Ashour Khalil Ibrahim Al Jumaili, Qusay Obaid Ibrahim Salloum, Loay Obaid Ibrahim Salloum and Saad Alwan Hamadi Yassin Al Mashhadani. The Government has not replied to the communication. The State is a party to the International Covenant on Civil and Political Rights.

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3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

**Submissions**

*Communication from the source*

4. According to the source, the following 24 Iraqi citizens are all employees or persons with alleged personal connections with the former Vice-President, Tariq Al Hashimi. They were all arrested by the Iraqi Security Forces between November 2011 and March 2012, secretly detained and tortured. Several of the individuals were sentenced to death under the Anti-Terrorism Law No. 13 of 2005 by the Central Criminal Court of Iraq, while others were sentenced to life imprisonment or 15 years of imprisonment. In a few cases, the terrorism charges were dropped but the individuals remain detained on other charges.[1]

5. Mohammed Hamid Ali Abdullah Al Jabouri was born in 1982 in Al Suwaira, Wasit Governorate. He usually resides in Al Suwaira. He is single and worked until 2009 as one of Mr. Al Hashimi's personal bodyguards. He was working as a farmer before being arrested on 21 May 2013.

6. Mohammed Nehme Abbas Mahmoud Al Jabouri was born in 1982 in Al Suwaira, Wasit Governorate. He usually resides in Al Suwaira. He is married and used to work as a farmer having been one of Mr. Al Hashimi's bodyguards until 2012. He is not related to Mohammed Hamid Ali Abdullah Al Jabouri. He was arrested on 21 May 2013.

7. Ahmad Ali Najim Rsan Al Abadi, born in 1977 in Baghdad, is married and the father of two children. He usually resides in Saidiya neighbourhood, Baghdad. He used to work as one of the personal bodyguards of Mr. Al Hashimi. He was arrested on 26 January 2012.

8. Omar Ali Najim Rsan Al Abadi, born in 1980 in Baghdad, is married and the father of three children. He usually resides in Saidiya neighbourhood, Baghdad. He used to work as one of Mr. Al Hashimi's personal bodyguards. He is the brother of Mr. Ahmad Ali Najim Rsan Al Abadi. He was arrested on 26 January 2012.

9. Uday Hafiz Abbas Ali Al Ali, born in 1971 in Baghdad, is married and the father of two children. He usually resides in Al Rachid district, Baghdad. He used to work as one of Mr. Al Hashimi's personal bodyguards. He was arrested on 27 December 2011.

[1] For the details on each individual, please refer to the table in the annex to the present opinion.

10. Ali Adel AbdelKarim Ismail Al Hashemi, born in 1982 in Anbar, usually resides in Anbar. Mr. Al Hashemi is single and used to work as one of Mr. Al Hashimi's personal bodyguards. He was arrested on 9 June 2012.

11. Mazen Ahmad Sattar Hasan Al Obaidi, born in 1973 in Baghdad, normally resides in Adamiyah neighbourhood in Baghdad. Mr. Al Obaidi is married and the father of four children. He used to work as one of Mr. Al Hashimi's personal bodyguards. He was arrested on 18 September 2012.

12. Riad Abdullah Razik, born in 1961, in Al Anabr, is married and the father of five children and usually resides in Yarmouk neighbourhood in Baghdad. He used to work as one of the personal bodyguards of Mr. Al Hashimi. He was arrested on 26 February 2012.

13. Mohammad Shawki Saoud Rahim Al Kubaisi, born in 1979 in Baghdad, usually resides in Yarmouk neighbourhood in Baghdad. He is married and used to work as one of Mr. Al Hashimi's personal bodyguards. He was arrested on 13 November 2011. The source reports that Mr. Al Kubaisi is the brother of Ahmad Al Kubaisi, whose detention was deemed arbitrary by the Working Group in its opinion No. 33/2017.

14. Buraq Abdel Ilah Jassim Mohamad Al Habsh, born in 1978 in Baghdad, usually lives in Yarmouk neighbourhood in Baghdad. He is single and used to work for the Iraqi Independent High Electoral Commission. He was arrested on 31 January 2012 on the accusation that he was one of Mr. Al Hashimi's bodyguards. However, according to the source, this information originated from a confession obtained through coercion from Qais Qader Mohammad Ali Abbas Al Bayati, whose detention was deemed arbitrary by the Working Group in its opinion No. 33/2017.

15. Qusay Saeed Abed Abbas Al Mashhadani, born in 1978, is married and normally lives in Tarmiyah town in the Saladin Governorate. He used to work as one of Mr. Al Hashimi's personal bodyguards. He was arrested on 26 July 2012.

16. Malik Abed Sultan Hamad, born in 1971, is married and normally lives in Al Rachid neighbourhood, Baghdad. Mr. Hamad used to work as an imam in a mosque. He was arrested on 19 December 2011 and forced to confess under torture that he had previously worked as a bodyguard for Mr. Al Hashimi.

17. Mohammad Firas Bahr Shati, born in 1976, usually resides in Al Rachid neighbourhood in Baghdad. Mr. Shati is married and used to work as a guard. He was arrested on 19 December 2011 and forced to confess under torture that he had previously worked as a bodyguard for Mr. Al Hashimi.

18. Hammad Zaidan Khalaf Al Fahdawi, born in 1970, is married and usually lives in Baghdad. He used to work as a real-estate consultant. According to the source, Mr. Al Fahdawi has no relationship with Mr. Al Hashimi, but he was informed that his name had been cited in the confession of a detainee. He was arrested on 17 March 2012.

19. Abdul Razak Abdul Rahman Hasan Al Dulaimi, born in 1982, usually resides in Baghdad. He is single and used to work as one of Mr. Al Hashimi's bodyguards. He was arrested on 19 December 2011.

20. Rafid Walid Rachid Majid Al Obaidi, born in 1987, usually resides in Adamiyah, Baghdad. He is married and the father of two children. Until he resigned, he worked for seven months as a bodyguard for Mr. Al Hashimi. Prior to his arrest, he was working in a bakery in Adamiyah, Baghdad. He was arrested on 18 September 2012.

21. Hicham Ali Nayef Shatr, born in 1975, is married and the father of three children. He usually resides in Baghdad and used to work as one of Mr. Al Hashimi's bodyguards. He was arrested on 19 December 2011.

22. Mustafa Mohammad AbdelKarim Salih Al Samurai Al Hasani, born in 1985 in Baghdad, is single and usually resides in Wazireya neighbourhood in Baghdad Province. He used to work as a doctor in the bodyguards' unit attached to Mr. Al Hashimi. He was arrested on 11 July 2012.

23. Ismail Nasif Jassim Al Mashhadani, born in 1971 in Al Tarmia, Saladin province, is married and the father of seven children. He usually resides in Al Tarmia town, Saladin

Province. He used to work as one of Mr. Al Hashimi's personal bodyguards. He was arrested on 26 December 2011.

24. Ali Moussa Hussein Al Ameri, born in 1982, is married and the father of three children. He used to reside in Diyala. He also used to work as one of Mr. Al Hashimi's personal bodyguards. He was arrested on 20 December 2011.

25. Salam Ashour Khalil Ibrahim Al Jumaili was born in 1980. He is married, and the father of five children. He used to live in Al Khalis District in Diyala Province and worked as one of Mr. Al Hashimi's bodyguards. He was arrested on 26 July 2012.

26. Loay Obaid Ibrahim Salloum, born in 1989, is married and usually lives in Yusufiyah, Baghdad Province. He used to work as one of Mr. Al Hashimi's personal bodyguards. He was also employed by the Ministry of Oil. He was arrested on 22 October 2012.

27. Qusay Obaid Ibrahim Salloum was born in 1987. He is single and normally lives in Yusufiyah, Baghdad Province. He used to work as a civil servant at the Ministry of Finance in Al Dora. He was arrested on 22 October 2012. Loay Obaid Ibrahim Salloum and Qusay Obaid Ibrahim Salloum are brothers.

28. Saad Alwan Hamadi Yassin Al Mashhadani, born in 1973 in Baghdad, is married. He usually lives in Al Tarmia town in the Saladin Governorate. He used to work as one of Mr. Al Hashimi's personal bodyguards. He was arrested on 2 January 2012.

*Background*

29. The source submits that the above cases illustrate a pattern of arbitrary detention of employees or persons with alleged connections with the former Vice-President of Iraq, Tariq Al Hashimi.

30. Mr. Al Hashimi was a leading member of the secular Al Iraquiya coalition and former Prime Minister Al Maliki's main electoral rival. He was a well-known critical voice of what he saw as Mr. Al Maliki's attempts to centralize power.

31. According to the source, in December 2011, in an escalation of tension between Mr. Al Maliki and Mr. Al Hashimi, at odds over the formation of a unity Government, the Iraqi Security Forces, under the orders of former Prime Minister Al Maliki, raided Mr. Al Hashimi's house, but did not find him there. He had left Baghdad on 18 December 2011 and fled first to the semi-autonomous Iraqi region of Kurdistan. He then left Kurdistan for security reasons to seek refuge in Turkey. The source reports that in retaliation, all members of his staff were arrested and individuals close to him allegedly continue to be victim of reprisals by the Iraqi authorities. On 19 December 2011, the Iraqi Ministry of the Interior announced during a press conference that an arrest warrant had been issued against Mr. Al Hashimi for having "orchestrated bombing attacks". During the conference, confessions at gunpoint of three of his bodyguards, who had been severely tortured and were still bearing signs of torture, were aired on the State-run channel Al Iraquiya, confirming that Mr. Al Hashimi had orchestrated such attacks.

32. According to the source, on 9 September 2012, Mr. Al Hashimi was sentenced to death in absentia by the Central Criminal Court, on the basis of his bodyguards' coerced testimonies. In November 2012, the Court issued a second death sentence against him for "plotting to assassinate government officials" and "having ordered bombings and other attacks from 2005 to 2011".

33. The source reports that between November 2011 and March 2012, the security services, tightly controlled by Prime Minister Al Maliki, carried out dozens of arrests targeting persons allegedly close to Mr. Al Hashimi, among them the individuals listed above. They were reportedly all taken to secret locations where they were severely tortured and forced to sign confessions incriminating themselves and Mr. Al Hashimi, on the basis of which they were later sentenced to death, life imprisonment or 15 years of imprisonment under the Anti-Terrorism Law No. 13 of 2005.

34. The source states that on 25 August 2016, the Iraqi parliament adopted the General Amnesty Law No. 27/2016, stipulating that individuals convicted between 2003 and the

enactment of the law are eligible to apply for amnesty, except those convicted of 13 types of crimes, including acts of terror resulting in death or permanent disability, human trafficking, rape, money laundering and embezzlement and theft of State funds. The Law provided for the creation of a judicial committee responsible for considering requests for retrials. Negative decisions can be appealed to the Court of Cassation. Under the present statute, most of the 24 above-mentioned individuals reportedly submitted requests for retrial to the Judicial Committee.

*Analysis of violations*

35. In the light of the information above, the source submits that all the cited cases fall within categories I, III and V of the arbitrary detention categories referred to by the Working Group when considering cases submitted to it.

Category I: absence of legal basis justifying the deprivation of liberty

36. The source submits that all 24 individuals were arrested without a warrant being issued previously by a judicial authority, nor were they given any reasons for their arrest. Moreover, they were reportedly all detained in secret for periods ranging from three months to one year and a half, and thus placed outside the protection of the law.

37. During this period, they were systematically denied access to their families and lawyers and unable to challenge the lawfulness of their detention. Neither their respective families nor their lawyers were able to obtain information on their fate or whereabouts, or the charges held against them.

38. The source thus argues that the detention of the 24 above-mentioned individuals lacks a legal basis and constitutes a violation of article 9 of the Universal Declaration of Human Rights and article 9 of the International Covenant on Civil and Political Rights, falling within category I.

Category III: non-observance of international fair trial norms

*Arbitrary arrest and secret detention*

39. According to the source, all the 24 individuals were arrested without being provided with an arrest warrant and without being informed of the reasons for their arrest. This violates article 92 of the Iraqi Criminal Code and articles 9 (1) and (2) of the Covenant.

40. Furthermore, the individuals were reportedly all detained incommunicado in secret locations, without being allowed any contact with the outside world, for a period ranging from 3 to 18 months. The source notes that, given that they put detainees completely outside the protection of the law, incommunicado and secret detention are prima facie arbitrary and violate the right to habeas corpus, as well as the right to be recognized as a person before the law (article 16 of the Covenant). Secret detention also constitutes a violation of the positive obligations of the authorities to ensure respect for the right to life of detainees, and it amounts to torture and inhuman and degrading treatment.

41. The source notes that in 2015, following its review of Iraq, the Committee against Torture raised concern over "questionable judicial practices under the 2005 Anti-Terrorist Law and the Code of Criminal Procedure, such as arrests without warrants, protracted pretrial detention, indefinite detention of suspects, and convictions based on the testimony of secret informants" (see CAT/C/IRQ/CO/1, para. 23).

*Torture and coerced confessions*

42. In addition, all the individuals listed above were allegedly subjected to torture through, inter alia, severe beatings, electrocution and threats, in violation of article 37 (1) (c) of the Iraqi Constitution prohibiting torture, articles 7 and 10 of the Covenant and article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

43. The source further submits that in all cases, torture was used to extract confessions that were then used as material evidence to convict the accused. According to the source,

that represents a violation of article 127 of the Iraqi Code of Criminal Procedure, article 37 of the Iraqi Constitution, article 14 (3) (g) of the Covenant and article 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The source notes that these violations fall within a pattern on which the Committee against Torture expressed concern, highlighting "routine and widespread use of torture and ill-treatment of suspects in police custody, as well as in pretrial detention centres run by the Ministries of the Interior and Defence, primarily to extract confessions or information to be used in criminal proceedings" (see CAT/C/IRQ/CO/1, para. 15).

*Violation of the right to legal counsel*

44. According to the source, none of the suspects were allowed to have their lawyers present during their interrogation nor to have their assistance during the investigative stage. They were reportedly only allowed to contact legal counsel during the trial. That violates article 19 (4) of the Iraqi Constitution, article 213 (b) (ii) of the Iraqi Criminal Code, and article 14 (1) and (3) (b) and (d) of the Covenant. It also violates principle 9 of the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Rights of Anyone Deprived of their Liberty to Bring Proceedings before a Court.

45. The source also refers to the findings of the Committee against Torture which, following its review of Iraq in 2015, concluded that "detainees are frequently deprived of timely access to a lawyer and a medical doctor, and of their right to notify a person of their choice. It is also concerned by allegations regarding the failure to maintain accurate registration records, adequately inform detained persons about their rights, and to adhere to the 24-hour limit for detainees to be brought before a judge (article 2)" (see CAT/C/IRQ/CO/1, para. 14).

*Violation of the right to be tried promptly by an independent tribunal*

46. In addition, the source submits that most of the individuals were only tried years after their arrest, in violation of their right to be tried without undue delay, guaranteed under article 14 (3) (c) of the Covenant. In the cases of Ismail Nasif Jassim Al Mashhadani and Abdul Razak Abdul Rahman Hasan Al Dulaimi, both were arrested in late 2011 and sentenced in 2017. In that respect, the source notes that under article 109 (b) of the Iraqi Code of Criminal Procedure, a person charged with the death penalty can be kept in detention "until the investigation phase is completed, or until the final decision is issued by the court in relation to the charges", therefore allowing for indefinite pretrial detention, in violation of article 9 (1) and (3) of the Covenant.

47. The source also argues that the trial of 24 individuals before the Central Criminal Court, a jurisdiction commonly known for not meeting international standards of due process, constitutes a violation of the right to a fair and public hearing by a competent, independent and impartial tribunal, pursuant to article 14 (1) of the Covenant. In that regard, the source recalls the findings of the Human Rights Committee which expressed concern over reports indicating that, "in practice, the judiciary is neither fully independent nor impartial" in Iraq (see CCPR/C/IRQ/CO/5, para. 35).

*Violation of the right to defence*

48. The source states that, while in secret detention, all 24 individuals were subjected to similar acts of torture in order to coerce them into self-incrimination. Despite the objections raised by their lawyers over the torture of their clients and the use of coerced evidence, the statements were reportedly used as incriminating evidence and no investigation was carried out into the torture allegations, in violation of article 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

49. The source notes that the Human Rights Committee has previously raised concerns in this regard, notably "about allegations of instances in which death sentences have been imposed on the basis of confessions obtained under duress or torture, or otherwise in the context of trials that did not meet the standards of article 14 of the Covenant" (see CCPR/C/IRQ/CO/5, para. 27).

50. The source also asserts that the collective imposition of the death penalty in most of the reported cases, without regard to individual criminal responsibility, and following a flawed procedure, during which forced confessions were admitted as evidence, violates article 6 (2) of the Covenant. According to the source, the systematic issuance of death sentences in a judicial system which "presents significant risks of grievous and irreversible miscarriages of justice"[2] constitutes a violation of the right to life.

51. The source thus submits that in light of the multiple violations of fundamental guarantees and the right to a fair trial carried out against all 24 individuals, their detention falls within category III. The source notes that, as a consequence, should the death penalty be carried out, the resulting deprivation of life would be arbitrary under article 6 of the Covenant.

Category V: for reasons of discrimination

52. The source furthermore submits that the arbitrary arrest and subsequent violation of the fundamental rights of the 24 above-mentioned individuals are a consequence of their perceived political and sectarian affiliation, resulting in unequal treatment before the law.

53. More precisely, they were reportedly arrested, tortured and sentenced to death, life imprisonment or 15 years of imprisonment, following an unfair trial owing to their alleged political affiliation resulting from their real or perceived links with former Vice-President Al Hashimi.

54. The source recalls that all the individuals were associated with Mr. Al Hashimi, and that most of them were his employees. Nevertheless, the source notes with concern that some of the victims have been targeted for merely being relatives of his employees, such as Qusay Obaid Ibrahim Salloum, or for having had their names cited in confessions extracted under torture, such as Buraq Abdel Ilah Jassim Mohamad Al Habsh. In addition, some of the individuals were no longer working for Mr. Al Hashimi, including Mohammed Hamid Ali Abdullah Al Jabouri and Mohammed Nehme Abbas Mahmoud Al Jabouri.

55. The source recalls the Working Group's opinion No. 33/2017 regarding 19 individuals arbitrarily detained for similar reasons, in which it concluded that it was "difficult … not to conclude that they have been subjected to apparently neutral but actually discriminatory wheels of justice" (see A/HRC/WGAD/2017/33, para. 99).

*Response from the Government*

56. On 23 January 2018, the Working Group transmitted the allegations from the source to the Government of Iraq through its regular communication procedure. The Working Group requested the Government to provide, by 23 March 2018, detailed information about the current situation of the 24 above-mentioned individuals and any comments on the source's allegations.

57. The Working Group regrets that it did not receive a response from the Government to that communication. Nor did the Government request an extension of the time limit for its reply, as provided for in the Working Group's methods of work.

**Discussion**

58. In the absence of a response from the Government, the Working Group has decided to render the present opinion, in conformity with paragraph 15 of its methods of work.

59. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues. If the source has established a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations (see A/HRC/19/57, para. 68). In the present case, the Government has chosen not to challenge the prima facie credible allegations made by the source.

[2] See United Nations Assistance Mission for Iraq and Office of the United Nations High Commissioner for Human Rights, "Report on the death penalty in Iraq" (Baghdad, October 2014), p. 26.

60. The Working Group wishes to reaffirm that the Government has the obligation to respect, protect and fulfil the right to liberty of person and that any national law allowing deprivation of liberty should be made and implemented in conformity with the relevant international standards set forth in the Universal Declaration of Human Rights and other applicable international or regional instruments.[3] Consequently, even if the detention is in conformity with national legislation, regulations and practices, the Working Group must assess whether such detention is also consistent with the relevant provisions of international human rights law.[4] The Working Group considers that it is entitled to assess the proceedings of a court and the law itself to determine whether they meet international standards.[5]

*Category I*

61. The Working Group will first determine whether it is clearly impossible to invoke any legal basis to justify the arrest and detention of the 24 individuals that would render it arbitrary in terms of category I.

62. The source has alleged, and the Government has chosen not to contest, that the 24 individuals were not presented with a judicially approved warrant and were not informed of the reasons for their arrest.

63. The Working Group notes that any deprivation of liberty without an arrest warrant issued by a competent, independent and impartial judicial authority is arbitrary and lacks any legal basis in violation of articles 3 and 9 of the Universal Declaration of Human Rights and article 9 of the Covenant as well as principles 2, 4 and 10 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.[6]

64. The Working Group further notes that the 24 individuals were subsequently held in incommunicado detention in a secret location for a period ranging from three months to one year and a half without being presented before a judge, thereby depriving them of their right to challenge the lawfulness of their deprivation of liberty, in violation of article 9 (4) of the Covenant.

65. The Working Group has, in its practice, consistently argued that holding persons incommunicado breaches the right to challenge the lawfulness of detention before a judge.[7] Articles 10 and 11 of the Universal Declaration of Human Rights also confirm the impermissibility of incommunicado detention. The Working Group notes that the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has consistently argued that the use of incommunicado detention is unlawful,[8] and the Human Rights Committee in its general comment No. 35 (2014) on liberty and security of person, argued that incommunicado detention that prevents prompt presentation before a judge inherently violates article 9 (3) of the Covenant. Furthermore, the Working Group notes that the 24 individuals were allegedly subjected to torture through, inter alia, severe beatings, electrocution and threats. Such practices of torture would have made it difficult for the victims to initiate proper judicial proceedings in order to challenge the lawfulness of their detention.

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[3] See General Assembly resolution 72/180 preambular para. 5, Commission on Human Rights resolutions 1991/42 para. 2 and 1997/50, para. 15, and Human Rights Council resolutions 6/4, para. 1 (a), 10/9, para. 4 (b); opinions No. 94/2017, para. 59; No. 88/2017, para. 32; No. 83/2017, paras. 51 and 70; No. 76/2017, para. 62; No. 28/2015, para. 41; and No. 41/2014, para. 24.

[4] See opinions No. 94/2017, para. 47; No. 76/2017, para. 49; No. 1/2003, para. 17; No. 5/1999, para. 15; and No. 1/1998, para. 13.

[5] See opinions No. 94/2017, para. 48; No. 88/2017, para. 24; No. 83/2017, para. 60; No. 76/2017, para. 50; and No. 33/2015, para. 80.

[6] See opinions No. 76/2017, para. 55; 63/2017, para. 66; No. 21/2017, para. 46; and No. 48/2016, para. 48.

[7] See, for example, opinions No. 53/2016 and No. 56/2016.

[8] See, for example, A/54/426, para. 42, and A/HRC/13/39/Add.5, para. 156.

66. The Working Group also recalls that in 2010, it completed a joint study with several other special procedure mandate holders on global practices in relation to secret detention in the context of counter-terrorism (A/HRC/13/42). The experts reiterated that international law prohibited secret detention, which violates several human rights norms, including the right to fair trial (see A/HRC/13/42, paras. 27 and 282). The experts found that certain practices inherent in secret detention, such as the use of secrecy and insecurity caused by the denial of contact with the outside world, placed detainees in a situation of heightened vulnerability to violations of the right to a fair trial, including forced confession of guilt, denial of the presumption of innocence, inability to challenge the lawfulness of detention, denial of access to legal representation and torture and ill-treatment.[9] Moreover, in its resolution 37/3, the Human Rights Council stressed that no one should be held in secret detention and urged States to ensure that all persons held in detention under their authority were provided with access to the courts and to investigate all alleged cases of secret detention, including under the pretext of counter-terrorism.

67. The Working Group therefore considers that the arrest and prolonged incommunicado detention in a secret location of the 24 individuals lack any legal basis in violation of articles 3, 6 and 9 of the Universal Declaration of Human Rights, articles 9, 14 and 16 of the Covenant and principle 2 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. The Working Group thus concludes that their detention is arbitrary, falling within category I.[10]

*Category III*

68. The Working Group will now consider whether the alleged violations of the right to a fair trial and due process suffered by the 24 individuals were of such gravity as to give their deprivation of liberty an arbitrary character, thus falling within category III.

69. The relevant yet not exhaustive factual and legal considerations, which have not been disputed by the Government, are illustrated below:[11]

(a) As noted above, none of the 24 individuals were promptly brought before a judge but instead held incommunicado in a secret place of detention outside the protection of the law for periods of three months to one year and a half, which effectively nullified their right to recognition everywhere as a person before the law, their right to challenge the lawfulness of their deprivation of liberty, to have adequate time and facilities for the preparation of their defence and to communicate freely with counsel of their own choosing (articles 6 and 9–11 of the Universal Declaration of Human Rights and articles 9 (3), 14 (3) (b) and (c) and 16 of the Covenant);[12]

(b) None of the 24 individuals were treated with humanity and all were subjected to various forms of torture and ill-treatment, including beatings, electrocution, rape and threats of rape directed at mothers and sisters. All of the 24 individuals were forced to sign confessions extracted under severe torture and ill-treatment, which were reportedly presented as the material evidence for their convictions by the Central Criminal Court (articles 3, 5, 11 (1) and 12 of the Universal Declaration of Human Rights and articles 7, 9 (1), 10 (1), 14 (3) (g) and 17 of the Covenant);

(c) All 24 individuals were interrogated without their lawyers being present, in violation of articles 10 and 11 (1) of the Universal Declaration of Human Rights, article 14 (1) and (3) (b) and (d) of the Covenant, article 19 (4) of the Iraqi Constitution and articles 123 (b) (2) and (c) and 144 of the Code of Criminal Procedure, ensuring the right to an attorney during all phases of the investigation and the trial;

[9] See opinions No. 14/2009, para. 21; and No. 5/2001, para. 10 (iii), in which the Working Group found that secret detention was per se a violation of the right to a fair trial under category III.

[10] See opinions No. 76/2017, para. 61; No. 63/2017, para. 53; No. 21/2017, para. 37; No. 17/2017, para. 37; *and No. 39/2016, para. 45.*

[11] For the details on each individual, please refer to the table in the annex to the present opinion.

[12] See A/HRC/13/42, para. 26, and Human Rights Council resolution 37/3, paras. 6 and 8.

(d) Most of the 24 individuals were only tried after a number of years (six years in the cases of Ismail Nasif Jassim Al Mashhadani and Abdul Razak Abdul Rahman Hasan Al Dulaimi) after their arrest, in violation of their right to be tried without undue delay (article 11 (1) of the Universal Declaration of Human Rights and article 14 (3) (c) of the Covenant).

70. With regard to access to legal assistance, the Working Group notes that all 24 individuals were interrogated without their lawyers being present and that some of them were not allowed to contact their lawyers during their trials or were prevented from contacting their lawyers in order to prepare their defence. The Working Group emphasizes that denial of legal assistance is a violation of article 14 (3) (b) and (d) of the Covenant, of principle 17 (1) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and of principle 9 of the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court.

71. The Working Group emphasizes that torture is prohibited under article 5 of the Universal Declaration of Human Rights and articles 7 and 10 of the Covenant, and the use of torture to extract confession or the use of such confessions are also prohibited, in particular under article 14 (3) (g) of the Covenant and article 15 of the Convention against Torture.[13] Domestic law must ensure that statements or confessions obtained in violation of article 7 of the Covenant are excluded from the evidence.

72. Especially in light of the death sentences imposed, the Working Group considers that the imposition of the death penalty following such a flawed procedure is, in itself, in violation of article 6 (2) of the Covenant, which provides that a death sentence may be imposed only if it is not contrary to the provisions of the Covenant.[14] The death sentences passed against 14 of the 24 individuals, based on confessions extracted under torture, are in particular a miscarriage of procedural justice, including their right to a fair trial. According to the safeguards guaranteeing protection of the rights of those facing the death penalty of 25 May 1984, capital punishment may be imposed only when the guilt of the person charged is based upon clear and convincing evidence, leaving no room for an alternative explanation of the facts. That is hardly the case in relation to the trial and conviction of the 14 individuals.

73. In the light of the foregoing, the Working Group concludes that the violations of the fair trial rights of the 24 individuals are of such gravity as to render their deprivation of liberty arbitrary, falling within category III.

*Category V*

74. The Working Group will now examine whether the deprivation of liberty of the 24 individuals constitutes illegal discrimination under international law, falling within category V.

75. The Working Group is persuaded that all of the 24 accused had real or perceived connections with Mr. Al-Hashimi. Most of them were or had been working as his bodyguards.

76. The Working Group emphasizes that the principle of individual criminal responsibility is one of the most fundamental tenets of the criminal law, as it has ousted the odious practice of collective punishment or guilt by association.

77. In the present case, which involves 24 individuals with alleged connections to Mr. Al-Hashimi, it is difficult for the Working Group not to conclude that they have been

[13] The Working Group concurs with the Human Rights Committee when it stated, in paragraph 41 of its general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, that article 14 (3) (g) guarantees the right not to be compelled to testify against oneself or to confess guilt and that, a fortiori, it is unacceptable to treat an accused person in a manner contrary to article 7 of the Covenant in order to extract a confession.

[14] See opinion No. 32/2017, para. 18. See also Human Rights Committee, general comment No. 6 (1982) on the right to life, para. 7.

caught up in apparently neutral but actually discriminatory wheels of justice, as it did in its opinion No. 33/2017 when it considered the case of 19 other individuals with similar connections to Mr. Al Hashimi.

78. The Working Group concludes that only discrimination based on political or other opinion — or, more precisely, what is perceived by the Government as such — that aims to ignore the equality of human beings may plausibly explain the subversion of the equal protection of the law experienced by the 24 individuals as observed above.

79. For those reasons, the Working Group considers that the deprivation of liberty of the 24 individuals constitutes a violation of article 2 of the Universal Declaration of Human Rights and articles 2 (1) and 26 of the Covenant on the grounds of discrimination based on political or other opinion aimed at and resulting in ignoring the equality of human beings and that it therefore falls under category V.

80. The Working Group recalls that, under certain circumstances, widespread or systematic imprisonment or other severe deprivation of liberty in violation of the rules of international law, may constitute crimes against humanity.

81. Given that the present case involves allegations of torture and ill-treatment, violation of fair trial and due process rights and counter-terrorism measures, the Working Group refers those matters to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Special Rapporteur on extrajudicial, summary or arbitrary executions, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism and the Special Rapporteur on the independence of judges and lawyers, for appropriate action.

**Disposition**

82. In the light of the foregoing, the Working Group renders the following opinion:

> The deprivation of liberty of Mohammed Hamid Ali Abdullah Al Jabouri, Mohammed Nehme Abbas Mahmoud Al Jabouri, Ahmad Ali Najim Rsan Al Abadi, Omar Ali Najim Rsan Al Abadi, Uday Hafiz Abbas Ali Al Ali, Ali Adel AbdelKarim Ismail Al Hashemi, Mazen Ahmad Sattar Hasan Al Obaidi, Riad Abdullah Razik, Mohammad Shawki Saoud Rahim Al Kubaisi, Buraq Abdel Ilah Jassim Mohamad Al Habsh, Qusay Saeed Abed Abbas Al Mashhadani, Malik Abed Sultan Hamad, Mohammad Firas Bahr Shati, Hammad Zaidan Khalaf Al Fahdawi, Abdul Razak Abdul Rahman Hasan Al Dulaimi, Rafid Walid Rachid Majid Al Obaidi, Hicham Ali Nayef Shatr, Mustafa Mohammad AbdelKarim Salih Al Samurai Al Hasani, Ismail Nasif Jassim Al Mashhadani, Ali Moussa Hussein Al Ameri, Salam Ashour Khalil Ibrahim Al Jumaili, Qusay Obaid Ibrahim Salloum, Uday Obaid Ibrahim Salloum and Saad Alwan Hamadi Yassin Al Mashhadani, being in contravention of articles 2, 5–6 and 9–11 of the Universal Declaration of Human Rights and articles 2, 6–7, 9–10, 14, 16 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, III and V.

83. Consequent upon the opinion rendered, the Working Group requests the Government of Iraq to take the steps necessary to remedy the situation of these 24 individuals without delay and bring it into conformity with the standards and principles set forth in the international norms on detention, including the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

84. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mohammed Hamid Ali Abdullah Al Jabouri, Mohammed Nehme Abbas Mahmoud Al Jabouri, Ahmad Ali Najim Rsan Al Abadi, Omar Ali Najim Rsan Al Abadi, Uday Hafiz Abbas Ali Al Ali, Ali Adel AbdelKarim Ismail Al Hashemi, Mazen Ahmad Sattar Hasan Al Obaidi, Riad Abdullah Razik, Mohammad Shawki Saoud Rahim Al Kubaisi, Buraq Abdel Ilah Jassim Mohamad Al Habsh, Qusay Saeed Abed Abbas Al Mashhadani, Malik Abed Sultan Hamad, Mohammad Firas Bahr Shati, Hammad Zaidan Khalaf Al Fahdawi, Abdul Razak Abdul Rahman Hasan Al Dulaimi, Rafid Walid Rachid Majid Al Obaidi, Hicham Ali Nayef Shatr, Mustafa Mohammad AbdelKarim Salih Al Samurai Al Hasani, Ismail Nasif Jassim Al

Mashhadani, Ali Moussa Hussein Al Ameri, Salam Ashour Khalil Ibrahim Al Jumaili, Qusay Obaid Ibrahim Salloum, Loay Obaid Ibrahim Salloum and Saad Alwan Hamadi Yassin Al Mashhadani immediately and accord them an enforceable right to compensation and other reparations, in accordance with international law. The Working Group also urges the Government to put an end to the persecution of the 24 individuals and others with real or perceived connections with the former Vice-President Tariq Al Hashimi.

85. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of the 24 individuals, including their allegations of torture, and to take appropriate measures against those responsible for the violation of their rights.

86. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers this case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Special Rapporteur on extrajudicial, summary or arbitrary executions, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism and the Special Rapporteur on the independence of judges and lawyers, for appropriate action.

**Follow-up procedure**

87. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

(a) Whether the 24 individuals have been released and, if so, on what date;

(b) Whether compensation or other reparations have been made to the 24 individuals;

(c) Whether an investigation has been conducted into the violation of the rights of the 24 individuals and, if so, the outcome of the investigation;

(d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Iraq with its international obligations in line with the present opinion;

(e) Whether any other action has been taken to implement the present opinion.

88. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example, through a visit by the Working Group.

89. The Working Group requests the source and the Government to provide the above information within six months of the date of the transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

90. The Government should disseminate through all available means the present opinion among all stakeholders.

91. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.[15]

[*Adopted on 26 April 2018*]

[15] See Human Rights Council resolution 33/30, paras. 3 and 7.

## Annex

### Summary of factual elements concerning the detainees

| Case number | Victim's name | Connection with Tariq Al Hashimi | Date of arrest | Arrest warrant | Access to lawyer/family | Duration of incommunicado detention | Interrogated without lawyer | Tortured | Sentence | Case number | Date of sentence | Appeal for retrial | Result | State of the proceedings |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 1 | Mohammed Hamid Ali Abdullah Al Jabouri | Bodyguard until 2009 | 21/05/2013 | No | No | 6 months | Yes | Yes | Death | 30/C1/2016 | 19/01/2016 | Yes | Accepted on 11/05/2017 | Awaiting retrial |
| 2 | Mohammed Nehme Abbas Mahmoud Al Jabouri | Bodyguard until 2012 | 21/05/2013 | No | No | 6 months | Yes | Yes | Death | 30/C1/2016 | 19/01/2016 | Yes | Accepted on 11/05/2017 | Awaiting retrial |
| 3 | Ahmad Ali Najm Rsan Al Abadi | Bodyguard | 26/01/2012 | No | No | 1 year and a half | Yes | Yes | 15 years | 1684/C2/2014 | 21/09/2015 | Yes | Rejected on 19/11/2017 | |
| 4 | Omar Ali Najm Rsan Al Abadi | Bodyguard | 26/01/2012 | No | No | 1 year and a half | Yes | Yes | Life | 1673/C3/2012 | 30/09/2012 | Yes | Accepted on 8/10/2017 | Charges dropped on 24/12/2017. Still detained on unknown charges |
| 5 | Uday Hafiz Abbas Ali Al Ali | Bodyguard | 27/12/2011 | No | No | 8 months | Yes | Yes | 15 years | 2492/C3/2012 | 2/12/2012 | Yes | Rejected on 27/12/2016 | Appeal pending before Cassation Court |
| 6 | Ali Adel AbdelKarim Ismail Al Hashemi | Bodyguard | 09/06/2012 | No | No | 5 months | Yes | Yes | Life | 2639/C1/2012 | 7/12/2015 | Yes | Pending | |



A/HRC/WG.6/30/IRQ/3

| Case number | Victim's name | Connection with Jaafar Al Hashimi | Date of arrest | Arrest warrant | Access to lawyer/family | Duration of incommunicado detention | Interrogated without lawyer | Confessed | Sentence | Case number | Date of sentence | Request for retrial | Result | State of the proceedings |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 7 | Mazen Ahmad Sattar Hasan Al Obaidi | Bodyguard | 18/09/2012 | No | No | 4 months | Yes | Yes | Death | 2598/C1/2014 | 10/03/2015 | Yes | Accepted on 21/06/2017 | Retried and declared innocent on 24/10/2017 but still detained on unknown charges |
| 8 | Riad Abdullah Razik | Bodyguard | 26/02/2012 | No | No | 7 months | Yes | Yes | Death | 1922/C3/2012 | 18/11/2012 | Yes | Pending | |
| 9 | Mohammad Shawki Saoud Rahim Al Kubaisi | Bodyguard | 13/11/2011 | No | No | 9 months | Yes | Yes | Death | 451/C1/2013 | 23/06/2013 | Yes | Rejected | Appeal pending before Cassation Court |
| 10 | Buraq Abdel Hah Jassim Mohamad Al Habsh | Via Qais Qader Mohammad Ali Abbas Al Bayati, Al Hashimi's bodyguard | 4/02/2012 | No | No | 3 months | Yes | Yes | Life | - | 2012 | Yes | Rejected | Appeal pending before Cassation Court |
| 11 | Qusay Saeed Abed Abbas Al Mashhadani | Bodyguard | 26/07/2012 | No | No | 8 months | Yes | Yes | Death | - | 29/05/2015 | Yes | Rejected | Appeal Pending before Cassation Court |
| 12 | Malik Abed Sultan Hamad | Was forced to confess under torture to being one of Al Hashimi's bodyguards — likely retaliation for having supported Al Hashimi in peaceful rallies | 19/12/11 | No | No | 1 year | Yes | Yes | Death | 746/C1/2012 | 17/02/2016 | Yes | Rejected | Appeal pending before Cassation Court |

| Case number | Detainee's name | Connection with fatig Al Hashimi | Date of arrest | Arrest warrant | Access to lawyer/family | Duration of incommunicado detention | Interrogated without lawyer | Tortured | Sentence | Case number | Date of sentence | Request for retrial | Result | State of the proceedings |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 13 | Mohammad Firas Bahr Shati | Was forced to confess under torture to being one of Al Hashimi's bodyguards — likely retaliation for having supported Al Hashimi in peaceful rallies | 19/12/2011 | No | No | 1 year | Yes | Yes | Death | 746/C1/2012 | 17/02/2016 | Yes | Rejected | Appeal pending before Cassation Court |
| 14 | Hammad Zaidan Khalaf Al Fahdawi | Named in the confession of another detainee | 17/03/2012 | No | No | 6 months | Yes | Yes | Death | - | 2014 | Yes | Rejected | Appeal pending before Cassation Court |
| 15 | Abdul Razak Abdul Rahman Hasan Al Dulaimi | Bodyguard | 19/12/2011 | No | No | 1 year | Yes | Yes | Terrorism charges dismissed | 659/C2/2017 and 1998/C2/2017 | 4/07/2017 18/08/2017 | No | N/A | Awaiting trial |
| 16 | Rafid Walid Rachid Majid Al Obaidi | Former bodyguard | 18/09/2012 | No | No | 6 months | Yes | Yes | 15 years and death | - | 2015 and 2016 | Yes (2 requests submitted) | Partially accepted | No longer sentenced to death. Second request for retrial pending before Cassation Court |
| 17 | Hicham Ali Nayef Shatr | Bodyguard | 19/12/2011 | No | No | 11 months | Yes | Yes | 15 years | 628/C3/2013 | 30/04/2013 | Yes | Rejected on 15/06/2017 | Appeal pending before Cassation Court. Awaiting trial related to four charges |
| 18 | Mustafa Mohammad AbdelKarim Salih Al Samurai Al Hasani | Doctor in the bodyguards' unit of Mr. Al Hashimi | 11/07/2012 | No | No | 3 months | Yes | Yes | Death | - | 27/10/2014 | Yes | Rejected | Awaiting execution |

| Case number | Victim's name | Connection with Tariq Al Hashimi | Date of arrest | Arrest warrant | Access to lawyer/family | Duration of incommunicado detention | Interrogated without lawyer | Tortured | Sentence | Case number | Date of sentence | Request for retrial | Result | State of the proceedings |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 19 | Ismail Nasif Jassim Al Mashhadani | Bodyguard | 26/12/2011 | No | No | 1 year | Yes | Yes | Acquitted | 1659/C2/2017 and 1998/C2/2017 | 4/07/2017 and 18/08/2017 | | | Awaiting trial related to other charges |
| 20 | Ali Moussa Hussein Al Ameri | Bodyguard | 20/12/2011 | No | No | 1 year | Yes | Yes | Death | 1132/C1/2013 | 2013 | Yes | Rejected on 29/10/2017 | Appeal pending before Cassation Court |
| 21 | Salam Ashour Khalil Ibrahim Al Jumaili | Bodyguard | 26/07/2012 | No | No | 1 year | Yes | Yes | Death | 2138/C1/2014 | 3/12/2014 | Yes | Rejected on 3/08/2017 | Appeal pending before the Court of Cassation |
| 22 | Qusay Obaid Ibrahim Salloum | Brother of victim 23 | 22/10/2012 | No | No | 3 months | Yes | Yes | Life | 1671/C1/2013 | 4/12/2013 | Yes | Pending | |
| 23 | Loay Obaid Ibrahim Salloum | Bodyguard | 22/10/2012 | No | No | 3 months | Yes | Yes | Death and 15 years | 1783/C1/2013 and 1707/C3/2016 | 18/02/2015 and 31/05/2016 | Yes | Pending | |
| 24 | Saad Alwan Hamadi Yassin Al Mashhadani | Bodyguard | 2/01/2012 | No | No | 10 months | Yes | Yes | Acquitted | 1238/C1/2016 | 12/06/2016 | | | Awaiting trial related to other charges |

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**Human Rights Council**
**Working Group on Arbitrary Detention**

# Opinions adopted by the Working Group on Arbitrary Detention at its eighty-first session, 17–26 April 2018

## Opinion No. 39/2018 concerning Abdu Ahmed Abdel Salam (Libya)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 33/30.

2. In accordance with its methods of work (A/HRC/36/38), on 8 February 2018 the Working Group transmitted to the Government of National Accord a communication concerning Abdu Ahmed Abdel Salam. The Government has not replied to the communication. The State is a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

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**Submissions**

*Communication from the source*

4. Mr. Abdel Salam is a Syrian national born in 1982. He and his family live permanently in Libya where they have a permanent residence status and a work permit. Mr. Abdel Salam was a shop assistant in a clothing shop in Sabha, Libya.

*Context*

5. According to the source, the Special Deterrence Force is an armed group that has been nominally integrated into the Libyan Ministry of the Interior. Its main forces are based in Mitiga, Tripoli. The source notes that, even though the Force is formally under the Ministry of the Interior, it is not under the effective control of the Government, retaining an independent chain of command. The Force is commanded by Abbdul Rauf Kara. Force personnel receive government salaries.

6. The source indicates that, after the relapse in the conflict in 2014, a battalion of the Special Deterrence Force was deployed to Sabha as a result of alliances with local forces and armed actors. According to the source, while the Force's central command is aligned with the internationally recognized Government of National Accord and the Presidential Council, the 116th Battalion of the Force in Sabha has reportedly pledged allegiance to the self-styled Libyan National Army, commanded by Khalifa Haftar, while at the same time appearing to retain some links with Tripoli.

7. According to the source, under Libyan law, the Special Deterrence Force, while authorized to conduct initial arrests, cannot lawfully detain any individual beyond 48 hours, after which it is obliged to refer the detainee to the judicial police. The latter is a police force that runs official prisons under the Ministry of Justice. The source recalls that the United Nations-sponsored Libyan Political Agreement of December 2015 provides that all armed groups, including those integrated into the Ministry of the Interior, should hand over their detainees to the judicial police. Reportedly, the Force is known to hold thousands of individuals in prolonged, unlawful imprisonment in its main detention facility at Mitiga, Tripoli.

*Arrest and detention*

8. According to the source, on 8 September 2016, Mr. Abdel Salam was arrested at his place of work, a clothing shop in Sabha. Initially, his family was unaware of his whereabouts, fearing that he had been abducted. At around 1 a.m., the following night, the family received a telephone call from a member of the 116th Battalion in Shaba, who informed them that Mr. Abdel Salam was in their custody. They were not immediately informed of the reason for the detention.

9. The source indicates that Mr. Abdel Salam has been detained at the 116th Battalion detention facility in an area called Tariq Mintaqa al Jdid. The facility is well known as a place of detention used by the 116th Battalion.

10. According to the source, Mr. Abdel Salam is a devout Muslim. Some perceive him as a conservative or as holding extreme religious views. However, according to the source, he is not a supporter of Islamic State in Iraq and the Levant or similar jihadist organizations. In the view of the source, Mr. Abdel Salam may have expressed his religious views to third parties in private, which may have prompted the third party to denounce him to local armed forces or authorities. The source maintains that Mr. Abdel Salam spent all his time in Sabha working in a clothing shop and, as such, was unlikely to have had the time or opportunity to serve as a member of any armed group.

11. According to the source, neither Mr. Abdel Salam nor his family has been informed by the Special Deterrence Force of the existence of any evidence against him. The source believes that the only evidence against Mr. Abdel Salam is a confession given under torture. Apparently, in their verbal communications with Mr. Abdel Salam's family, officials of the 116th Battalion maintain that he is a follower of the ideology of Islamic State in Iraq and the Levant and a member of a terrorist network.

12. According to the source, Mr. Abdel Salam was able to receive a family visit for the first time about two months after his arrest. Since then, the family has been able to obtain advance permission to visit him on a regular basis, approximately every 14 days. The visits were initially attended by a member of the Special Deterrence Force. At a later stage, when women or the victim's elderly father were visiting, visits were conducted in private, but lasted only between 5 and 10 minutes. Visits by younger male relatives have been overseen by Force personnel, due to the perceived risk of attempts to release the detainee.

13. Reportedly, due to the inadequacy of what is on offer at the detention facility, family members regularly bring food and medicine to Mr. Abdel Salam. Mr. Abdel Salam's health condition has, however, deteriorated since his initial detention; he has lost weight, appears very weak and might be anaemic.

14. Furthermore, the source reports that there are credible allegations that Mr. Abdel Salam has been tortured; methods have included beatings and torture by electrocution and denial of food. The source also submits that Mr. Abdel Salam has given a confession under duress.

15. The source reports that some family members have indicated a severe deterioration in Mr. Abdel Salam's mental health. During a visit in late 2017, Mr. Abdel Salam halted all verbal communication and appeared not to recognize close relatives. His situation has improved slightly and he has resumed verbal communication, but he still appears fragile psychologically.

16. According to the source, Mr. Abdel Salam has not yet had access to a lawyer. Whenever family members have attempted to solicit legal services, local legal professionals have refused to take on the case or even visit Mr. Abdel Salam in his current place of detention, out of fear of the Special Deterrence Force.

17. The source also specifies that, to date, the detainee has not been referred to the judicial authorities or presented with formal criminal charges.

18. Reportedly, at the end of 2017, a staff member assisting the Commander of the 116th Battalion told family members that Mr. Abdel Salam might be transferred to the main base of the Special Deterrence Force in Tripoli. The family was opposed to this, given the distance to Tripoli and the general mistrust of the Force, as it is known that they do not follow orders from the Government. A suggestion that Mr. Abdel Salam be transferred to Benghazi, controlled by the Libyan National Army, was also opposed by the family, for similar reasons. So far, no transfer has taken place.

19. Moreover, the family has repeatedly approached the Mayor of Sabha to plead for the release of Mr. Abdel Salam. According to the source, in mid-2017, the Mayor stated in conversations with the family that the only solution to the situation would be that if released, he would be deported from Libya within 24 hours. In this respect, the source pointed out that Mr. Abdel Salam does not hold a valid Syrian passport. The Mayor also claimed that there was "nothing more he could do", as he was "not in control of the 116th Battalion".

20. The source further indicates that, in May 2017, the United Nations Support Mission in Libya (UNSMIL) contacted the Mayor of Sabha by phone to request further information about the case of Mr. Abdel Salam and to reiterate that he has the right to appear before a court in order to challenge the decision to detain him. The Mayor stated his willingness to raise the issue with the detaining force. This intervention was to no avail. In June 2017, UNSMIL conveyed a letter to the office of the Commander of 116th Battalion in Sabha, Masoud Jeddi, identifying the case of Mr. Abdel Salam and requesting a clarification of his legal status. To date, UNSMIL has not received any response.

21. According to the source, since then, repeated attempts by the family to negotiate a release with officials of the 116th Battalion have been fruitless.

*Response from the Government*

22. On 8 February 2018, the Working Group transmitted the allegations from the source to the Government under its regular procedure. The Working Group requested the

Government to provide, by 9 April 2018, detailed information about the current situation of Mr. Abdel Salam and any comments on the source's allegations.

23. The Working Group regrets that it did not receive a response from the Government, nor did the Government request an extension of the time limit for its reply, as provided for in the Working Group's methods of work.

**Discussion**

24. In the absence of a response from the Government, the Working Group has decided to render the present opinion, in conformity with paragraph 15 of its methods of work.

25. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues. If the source has established a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations (see A/HRC/19/57, para. 68). In the present case, the Government has chosen not to challenge the prima facie credible allegations made by the source.

26. Before considering the substance of the allegations made by the source, the Working Group takes note of the fact that Mr. Abdel Salam was detained by the Special Deterrence Force and held by its 116th Battalion in Sabha. The Working Group notes that, while this group is integrated into the Libyan Ministry of the Interior, allegedly, it is not, however, under the de facto control and command of the Government of National Accord, which is the only Government recognized by the Security Council (see resolution 2259 (2015)).

27. Nevertheless, the source has argued and the Government has not challenged the allegation that those who conducted the arrests and who control the detention facilities in which Mr. Abdel Salam is held, the 116th Battalion, in fact, receive salaries from the Government through the Ministry of the Interior (see para. 5 above). The Working Group also takes note that, in its recent report on the situation of arbitrary detention in Libya, the Office of the United Nations High Commissioner for Human Rights (OHCHR) states that the Special Deterrence Force receives support, including salaries, uniforms and equipment, from the State, but effectively maintains its own command structures and operates with a significant level of autonomy.[1]

28. In this respect, the Working Group observes that, in his 2017 report on the situation of human rights in Libya, the High Commissioner pointed out that the use of armed groups to carry out State law enforcement functions had compounded the problems of impunity. Since 2012, armed groups have been nominally integrated into various State structures, including the Ministries of Defence, the Interior and Justice, while in practice maintaining their own command and control structure. Under this arrangement, the State continued to pay their salaries, while the armed groups carried out law enforcement functions, such as arrests and running detention centres, with little or no official oversight or control.[2]

29. The High Commissioner recommended that the Government urgently address the proliferation of armed groups, including through disarmament, demobilization and reintegration, and the building of national security forces under the command and control of the State.[3] He further recommended that the Government also address the situation of detainees, whether foreign or Libyan nationals, by ensuring that the State was in control of all detention facilities and that cases were screened with a view to detainees being released or charged and judged in a trial affording all procedural guarantees, in accordance with Libyan law and international standards.[4]

30. In the view of the Working Group, the fact that the Special Deterrence Force members are on the State's official payroll is a significant indicator, which demonstrates a

[1] OHCHR, "Abuse behind bars: arbitrary and unlawful detention in Libya" (Geneva, April 2018), p. 18.

[2] See A/HRC/34/42, para. 64.

[3] Ibid., para. 86 (a).

[4] Ibid., para. 86 (c).

close link between the Government and the Force.[5] Moreover, the Working Group is mindful of the decree issued by the Presidency Council,[6] which, inter alia, authorizes the Force and its 116th Battalion to implement State security policy and to combat organized crime and terrorism on behalf of the Government, including to arrest suspects. This document also makes it clear that the Force and its 116th Battalion are affiliated with the Ministry of the Interior.

31. Article 5 of the articles on responsibility of States for internationally wrongful acts, which represents customary international law, clarifies that the conduct of a person or entity that is not an organ of the State but that is empowered by the law of that State to exercise elements of governmental authority is considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.[7] In the present case, the Special Deterrence Force was clearly mandated by the Government to detain individuals through this decree and therefore, as a very minimum, it should have known of the actions carried out by the Force, it should have taken measures to protect individuals and should have known that such actions would overstep the boundaries of legality.

32. Moreover, the positive obligation of the State to prevent and punish crimes in order to uphold its human rights duties remains intact irrespective of whether the actions of the Special Deterrence Force can be attributed to the Government. The Working Group concludes that, in this case, the Government is responsible for the actions of the Force.

33. The source has submitted the allegation, which was not challenged by the Government, that Mr. Abdel Salam was arrested by the Special Deterrence Force on 8 September 2016 without a warrant, without giving any reasons for his detention at the time of the arrest and without having been informed of any charges since then.

34. The Working Group recalls that article 9 (2) of the Covenant requires that anyone who is arrested must be promptly informed of the reasons for the arrest and of any charges brought against him or her. The right to be promptly informed of charges concerns notice of criminal charges and, as the Human Rights Committee has noted in paragraph 29 of its general comment No. 35 (2014) on liberty and security of person, this right applies in connection with ordinary criminal prosecutions and also in connection with military prosecutions or other special regimes directed at criminal punishment. In the present case, Mr. Abdel Salam has been in detention for a period of more than 19 months and must still be informed of any formal charges against him. In other words, the authorities have not formally invoked any legal basis justifying his detention. This is a breach of article 9 (2) of the Covenant.

35. Furthermore, in order to establish that detention is legal, anyone detained has the right to challenge the legality of his or her detention before a court, as envisaged by article 9 (4) of the Covenant. The Working Group wishes to recall that, according to the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, the right to challenge the lawfulness of detention before a court is a self-standing human right, which is essential to preserve legality in a democratic society.[8] This right, which is in fact a peremptory norm of international law, applies to all forms of deprivation of liberty,[9] applies to all situations of deprivation of liberty, including not only to detention for purposes of criminal proceedings but also to situations of detention under administrative and other fields of law, including military detention, security detention, detention under counter-

[5] See also opinion No. 6/2017, see also opinions No. 3/2016 and No. 4/2016.

[6] See Decree No. 555 (2018), establishing the Al Radaa Authority, read in the light of a 2011 decree of the National Transitional Council, in which the Special Deterrence Force was converted to armed brigades under the Supreme Security Council and were later placed under the control of the Ministry of the Interior (see resolution No. 191 of 2011 dissolving the Supreme Security Council).

[7] See the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, principle 2; see also A/HRC/34/42, para. 22.

[8] See A/HRC/30/37, annex, paras. 2–3.

[9] Ibid., para. 11.

terrorism measures, involuntary confinement in medical or psychiatric facilities, migration detention, detention for extradition, arbitrary arrests, house arrest, solitary confinement, detention for vagrancy or drug addiction, and detention of children for educational purposes.[9] Moreover, it also applies irrespective of the place of detention or the legal terminology used in the legislation. Any form of deprivation of liberty on any ground must be subject to effective oversight and control by the judiciary.[11]

36. The Working Group notes that, since his arrest on 8 September 2016, Mr. Abdel Salam has not been presented before any judicial authority that would have been able to proclaim on the legality or otherwise of his detention. He has thus been detained for over 19 months without any possibility to challenge the legality of his detention in breach of article 9 (4) of the Covenant. The Working Group observes that this was a breach of article 9 (3) of the Covenant as the authorities failed to bring Mr. Abdel Salam promptly before a judicial authority for trial or release.

37. Moreover, the Working Group notes that, in order to ensure the effective exercise of this right, the detained persons should have access, from the moment of arrest, to legal assistance of their own choosing as stipulated in the Basic Principles and Guidelines.[12] This was denied to Mr. Abdel Salam, which de facto deprived him of the liberty to exercise his right to challenge the legality of his detention, further denying him his rights under article 9 (4) of the Covenant.

38. In this respect, the Working Group is particularly alarmed to note that the lawyers approached by the family of Mr. Abdel Salam declined to undertake the task due to fears of being themselves detained by the Special Deterrence Force. The Working Group underlines that it is the legal and positive duty of the State to protect everyone on its territory or under its jurisdiction against any human rights violation and to provide remedies whenever a violation occurs. The Working Group recalls in particular that the Basic Principles and Guidelines state that legal counsel should be able to carry out their functions effectively and independently, free from fear of reprisal, interference, intimidation, hindrance or harassment (see A/HRC/30/37, annex, para. 15). The Working Group refers the present case to the Special Rapporteur on the independence of judges and lawyers for further consideration.

39. The Working Group concludes that, given that the detention of Mr. Abdel Salam took place without an arrest warrant, that no formal charges have been brought against him since the arrest and that he has been effectively prevented from exercising his right to challenge the legality of detention, his arrest and detention are arbitrary and fall under category I of the Working Group.

40. The Working Group observes that Mr. Abdel Salam has been in detention since 8 September 2016 and no charges have been brought against him, which is a total denial of his rights under article 14 (3) (a) of the Covenant. Furthermore, as already discussed above, Mr. Abdel Salam has been denied any legal assistance and the attempts by his family to ensure that he has a legal counsel have been unsuccessful due to the fear of reprisals of the lawyers approached. The Working Group has already expressed its view that the Libyan authorities must ensure the ability of legal counsels to operate professionally without fear of reprisals. In the context of fair trial rights, this also constitutes a breach of Mr. Abdel Salam's rights under article 14 (3) (d) of the Covenant.

41. The Working Group observes that the family members of Mr. Abdel Salam were not informed of his detention until a day after his arrest; they were prevented from visiting him for about two months and that, since then, the visits have been allowed every 14 days. The failure to allow Mr. Abdel Salam to notify his family of his whereabouts and the failure by the authorities to inform his family of his whereabouts promptly is a violation of principle 19 of the Body of Principles for the Protection of All Persons under Any Form of Detention

[9] Ibid., para. 47 (a).
[11] Ibid., para. 47 (b).
[12] Ibid., principle 9, paras. 12–15.

or imprisonment as is the failure to allow family visits for the first two months of Mr. Abdel Salam's detention.

42. The Working Group is concerned about the allegations of torture and ill-treatment, including for the extraction of confessions, made by the source in relation to Mr. Abdel Salam. Those allegations have not been challenged by the Government. The treatment described reveals a prima facie breach of the absolute prohibition of torture, which is a peremptory norm of international law, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, of the Body of Principles (principle 6) and of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) (rule 1). The Working Group therefore refers the present case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment for further consideration.

43. Moreover, the Working Group notes that the use of a confession extracted through ill-treatment may also constitute a violation by Libya of its international obligation under article 15 of the Convention against Torture. Furthermore, the Body of Principles specifically prohibits taking undue advantage of the situation of detention to compel confession or incriminating statements (see principle 21).[11] It is also a breach of article 14 (3) (g) of the Covenant.

44. Furthermore, the Working Group observes that Mr. Abdel Salam is a Syrian national. Therefore, Libya must respect the obligations that it undertook when it became a State party to the Vienna Convention on Consular Relations. The Working Group notes that consular assistance or consular protection constitutes an important safeguard for individuals who are arrested and detained in a foreign State to ensure that international standards are being complied with. It provides such detainees, as well as consular officials of the detainee's nationality, with certain consular rights, which include, inter alia, the right to freely communicate with and have access to their detained nationals and to be informed about the arrest without delay.

45. The Working Group considers that the disregard for Mr. Abdel Salam's fair trial rights has been of such gravity as to render his detention arbitrary and to fall under category III.

46. The Working Group is seriously alarmed by the reported deteriorating physical and mental health of Mr. Abdel Salam and reminds the Government of its obligations under international law to preserve his life and well-being. The Working Group refers the present case to the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

47. The Working Group is mindful of the recent report on the situation of arbitrary detention in Libya by OHCHR.[12] The pattern of arbitrary deprivation of liberty documented in that report is very similar to the circumstances in the present case, which is of great concern to the Working Group. The Working Group strongly urges the Government and other stakeholders to urgently implement the recommendations of the High Commissioner as detailed in that report.

**Disposition**

48. In the light of the foregoing, the Working Group renders the following opinion:

> The deprivation of liberty of Abdu Ahmed Abdel Salam, being in contravention of articles 3, 9 and 10 of the Universal Declaration of Human Rights and of articles 9 and 14 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I and III.

49. Consequent upon the opinion rendered, the Working Group requests the Government to take the steps necessary to remedy the situation of Mr. Abdel Salam without delay and bring it into conformity with the standards and principles set forth in the

[11] See also opinions No. 48/2016, No. 3/2017, No. 6/2017 and No. 29/2017.

[12] OHCHR, "Abuse behind bars".

international norms on detention, including the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

50. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Abdel Salam immediately and accord him an enforceable right to compensation and other reparations, in accordance with international law.

51. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Mr. Abdel Salam, and to take appropriate measures against those responsible for the violation of his rights.

52. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on the independence of judges and lawyers, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

**Follow-up procedure**

53. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

(a) Whether Mr. Abdel Salam has been released and, if so, on what date;

(b) Whether compensation or other reparations have been made to Mr. Abdel Salam;

(c) Whether an investigation has been conducted into the violation of Mr. Abdel Salam's rights and, if so, the outcome of the investigation;

(d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Libya with its international obligations in line with the present opinion;

(e) Whether any other action has been taken to implement the present opinion.

54. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example, through a visit by the Working Group.

55. The Working Group requests the source and the Government to provide the above information within six months of the date of the transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

56. The Government should disseminate through all available means the present opinion among all stakeholders.

57. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.[15]

[*Adopted on 26 April 2018*]

[15] See Human Rights Council resolution 33/30, paras. 3 and 7.

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**Human Rights Council**
**Working Group on Arbitrary Detention**

# Opinions adopted by the Working Group on Arbitrary Detention at its eighty-second session, 20–24 August 2018

## Opinion No. 40/2018 concerning Jeong-in Shin and Seung-hyeon Baek (Republic of Korea)*

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in Council resolution 33/30.

2. In accordance with its methods of work (A/HRC/36/38), on 9 May 2018 the Working Group transmitted to the Government of the Republic of Korea a communication concerning Jeong-in Shin and Seung-hyeon Baek. The Government replied to the communication on 9 July 2018. The Republic of Korea is a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

* In accordance with paragraph 5 of the Working Group's methods of work, Seong-Phil Hong did not participate in the discussion of the present opinion.

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

**Submissions**

*Communication from the source*

4. The case presented by the source concerns two individuals who have each been sentenced to terms of imprisonment because of their refusal to undertake military service in the Republic of Korea.

*Detention of Jeong-in Shin*

5. Jeong-in Shin is a 23-year-old Korean citizen who usually resides in Gyeonggi-do, Republic of Korea. Mr. Shin is a Jehovah's Witness and a conscientious objector to military service. He was indicted for evading military service by refusing to enlist on 22 December 2015. The source states that the legal basis for the detention was article 88 (1) of the Military Service Act.

6. The source provided a copy of the trial judgment delivered by the Bucheon Branch of Incheon District Court on 9 June 2016. The judgment acknowledged that Mr. Shin had been a devout Jehovah's Witness since he was very young. The trial judge also recalled that Jehovah's Witnesses do not participate in secular political activities, but remain strictly neutral. In addition, the trial judge found that members of that faith believed that they should not cause harm to or use weapons against others, and that they refused to perform military duty or engage in any form of war.

7. According to the trial judgment, Mr. Shin pleaded in his defence that he could not act against his faith and conscience. However, he also informed the Court that, instead of undertaking military duty, he was willing to perform alternative service or serve the community in a manner that was not related to the military. The trial judge considered that the duty of national defence was not limited to those who actually joined the military, and could be undertaken in other ways. It was for the legislature to define the scope of active service duty, and to determine what constituted alternative service. Moreover, the trial judge found that "justifiable grounds" for refusing to perform military duty under article 88 (1) of the Military Service Act should not be interpreted in a manner that violated the fundamental right to freedom of conscience.

8. As a result, the trial judge determined that Mr. Shin's sincere religious beliefs and conscience were a "justifiable ground" for not performing military service, and that his situation fell within the freedom of conscience guaranteed by article 19 of the Constitution. On that basis, the Court found that Mr. Shin was not guilty.

9. The source reports that the decision in favour of Mr. Shin was overturned on appeal. In its appeal judgment of 3 February 2017, Incheon District Court considered that the freedom to exercise one's conscience must be a relative freedom and could be limited. The Court found that the freedom of conscience was not superior to the constitutional duties of military service and national defence, the purpose of which was to ensure the dignity and value of all citizens. The restriction on Mr. Shin's freedom of conscience was justified by article 37 (2) of the Constitution. Moreover, the Court considered that the absence of alternative service should not be considered as a violation of article 18 of the Covenant. Mr. Shin was sentenced to 18 months' imprisonment. The Supreme Court subsequently upheld the decision of Incheon District Court on 15 June 2017.

10. On 21 June 2017, Mr. Shin was arrested and imprisoned at the Incheon Detention Centre. According to Mr. Shin's certificate of detention, he is due to complete his sentence on 20 December 2018. He has now been in detention for more than 14 months.

*Detention of Seung-hyeon Baek*

11. Seung-hyeon Baek is a 21-year-old Korean citizen who usually resides in Gyeonggi-do. Mr. Baek is also a Jehovah's Witness and conscientious objector to military service. Mr. Baek was indicted for evading military service by refusing to enlist on 13 November 2017.

12. The source reports that the Yeoju Branch of Suwon District Court sentenced Mr. Baek to 18 months' imprisonment on 4 April 2018. The source provided a copy of the trial judgment, which noted that, even though United Nations human rights institutions had adopted resolutions recognizing the right to conscientious objection to military service based on article 18 of the Covenant, such resolutions were not directly binding on the Republic of Korea. In addition, the Court considered that there was no customary international law concerning the protection of the right to conscientious objection to military service. Accordingly, the Court did not accept Mr. Baek's claim that a right to refuse to perform military service for reasons of conscience should be recognized under the Constitution and the Covenant. Furthermore, the Court considered that there was no current exemption for reasons of religious faith provided in law and no provision for alternative service under the Military Service Act. In view of the discretion given to the legislature under the Constitution, the Court could not interpret a "justifiable ground" under the Military Service Act as including the act of refusing to perform military service for reasons of religious conscience.

13. Suwon District Court ordered that Mr. Baek's sentence commence with immediate effect. The source submits that the trial judge's decision to detain Mr. Baek immediately at the Court is a rare and harsh order concerning a conscientious objector, and was unheard of in the Republic of Korea during the previous 10 years. Mr. Baek has appealed the decision of Suwon District Court. His criminal case has not been finalized and the appeal is currently pending.

14. According to Mr. Baek's certificate of detention, he was initially detained at Yeoju Prison. He was then transferred to Suwon Detention Centre on 13 April 2018, where he awaits his appeal hearing. He has now been in detention for more than four months.

15. The source emphasizes that the Court's decision to detain Mr. Baek is contrary to recent positive developments in the Republic of Korea. For example, the source notes that just one day after Mr. Baek's sentencing and detention, another trial court rendered a decision of not guilty in relation to a conscientious objector who had refused to undertake military service on the same grounds as Mr. Baek.

16. The source reports that, between May 2015 and 19 April 2018, trial and appellate courts rendered 78 decisions finding conscientious objectors not guilty. In addition, as of December 2017, 687 cases involving conscientious objectors were pending before the courts, while the lower courts await a ruling by the Constitutional Court on the right to refuse to perform military service. The source notes that, despite numerous recommendations from the international community, as well as undeniable evidence that imprisoning conscientious objectors constitutes arbitrary detention, the Government continues to criminalize conscientious objection to military service. As of January 2018, 309 people were incarcerated for this reason. Over the past 70 years, more than 19,300 conscientious objectors have been imprisoned for exercising their freedom of conscience in the Republic of Korea.

**Category II: exercise of fundamental rights**

17. The source submits that the basis of the conscientious objection of Mr. Shin and Mr. Baek is their strict adherence to sincerely held religious beliefs. The source recalls that the right to conscientious objection to military service is protected by the Covenant, and that this protection has been recognized by both the Working Group on Arbitrary Detention and the Human Rights Committee.

18. In particular, the source submits that the Covenant recognizes that the right to conscientious objection to military service inheres in the right to freedom of conscience under article 18 (1) of the Covenant. The source also points out that imprisonment for the

legitimate exercise of rights constitutes arbitrary detention under article 9 (5) of the Covenant. The source refers to a report published in May 2017 by the Office of the United Nations High Commissioner for Human Rights, which states that States must ensure that no one is detained arbitrarily, particularly in indiscriminate round-ups with the aim of identifying young persons who have failed to resolve their military status. States should release individuals who are imprisoned or detained solely on the basis of their conscientious objection to military service.[1]

19. Accordingly, the source considers that the detention of Mr. Shin and Mr. Baek is arbitrary. Their situation falls within category II because they are detained as a result of the exercise of their freedom of conscience guaranteed by article 18 of the Universal Declaration of Human Rights and article 18 of the Covenant.

*Response from the Government*

20. On 9 May 2018, the Working Group transmitted the allegations from the source to the Government under its regular communication procedure. The Working Group requested the Government to provide detailed information by 9 July 2018 about the current situation of Mr. Shin and Mr. Baek. The Working Group also requested the Government to clarify the legal provisions justifying their continued detention, as well as its compatibility with the obligations of the Republic of Korea under international human rights law. Moreover, the Working Group called upon the Government to ensure the physical and mental integrity of the two individuals.

21. The Government submitted its response on 9 July 2018. In its response, the Government confirms that Mr. Shin and Mr. Baek were imprisoned at a detention centre after being convicted under article 88 (1) of the Military Service Act. This provision stipulates that any person who "fails to enlist in the military or to comply with the call even after three days from the date of enlistment or call without justifiable grounds" shall be punished.

22. According to the Working Group's methods of work, the deprivation of liberty as a result of the exercise of the rights or freedoms guaranteed by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant is deemed arbitrary under category II. The Government submits that this does not apply to the case of Mr. Shin and Mr. Baek, as their imprisonment amounts to a justifiable limitation on the freedom to manifest one's religion or beliefs in conformity with the requirements of article 18 (3) of the Covenant.

23. The Government indicates that, since 2006, it has explored ways of implementing an alternative to military service with a view to promoting human rights. However, the long-standing military tension on the Korean Peninsula necessitates the maintenance of military power of considerable size and the universal imposition of compulsory military service to safeguard national security. These circumstances led the Government to continue to uphold sanctions against conscientious objectors as a necessary and justifiable restriction pursuant to article 18 (3) of the Covenant.

24. In addition, the Government notes that, in its previous jurisprudence, the Working Group found that the right of conscientious objection is protected by article 18 (1) of the Covenant as a "manifestation" of one's religion, which may be subject to limitation under article 18 (3) of the Covenant (see opinion No. 16/2008, para. 36). The Government refers to a similar finding by the Human Rights Committee in 2007, in which the Committee found a claim of conscientious objection to military service to be a protected form of manifestation of religious belief under article 18 (1), and clarified that restrictions on conscientious objectors, such as conviction and sentence, must be justified by the permissible limits outlined in article 18 (3) (see CCPR/C/88/D/1321-1322/2004).

25. The Government acknowledges that the Human Rights Committee, in its Views on communications submitted on behalf of 100 conscientious objectors in the Republic of Korea in 2011 (CCPR/C/101/D/1642-1741/2007), assumed that the right of conscientious objection inhered in the right to freedom of thought, conscience and religion guaranteed by

[1] See A/HRC/35/4, para. 65.

article 18 (1) of the Covenant and must not be impaired by coercion. Accordingly, the Committee found that punishment for the refusal to be drafted for military service on the grounds of conscience or religious belief was a violation of the Covenant, with no need to invoke article 18 (3). The Committee has subsequently maintained its stance in similar cases.

26. However, the Government reiterates its view that the conscientious objection to military service constitutes an act of explicitly manifesting one's religion or beliefs. Therefore, the exercise of the right must be subject to the limitations prescribed in article 18 (3) of the Covenant. According to the Government, the Covenant differentiates between freedom of conscience that is non-derogable from one that may be subject to limitations. That is, article 18 distinguishes freedom to have or to adopt a religion or belief from freedom to manifest one's religion or belief in worship, observance, practice and teaching, the latter being subject to restrictions under article 18 (3). The Government recalls that the Human Rights Committee also acknowledged this distinction in its general comment No. 22 (1993) on the right to freedom of thought, conscience and religion.

27. The Government also points out that the Human Rights Committee has not provided a definition of "conscience", nor has it clarified the scope of legitimate limitation of the freedom to manifest one's conscience under article 18 (3) of the Covenant. Given that the dictionary definition of the term "manifest" is "to show something clearly, through signs or actions", conscientious objection to military service and refusing enlistment amounts to the explicit "manifestation" of one's conscience. Moreover, the Government argues that interpreting conscientious objection as an absolute right that "inheres in the right to freedom of thought, conscience and religion" may result in a de facto invalidation of article 18 (3) of the Covenant.

28. In addition, the Human Rights Committee has stated in a recent communication (see CCPR/C/112/D/2179/2012, para. 7.3) that it considers that the claim of conscientious objection may be differentiated from the refusal to pay taxes or the refusal of mandatory education because, unlike schooling or payment of taxes, military service implicates individuals in a self-evident level of complicity with a risk of depriving others of life.[1] According to the Government, such complicity may be a reason for more meticulous consideration of proportionality and the necessity of limitations prescribed in article 18 (3) of the Covenant, but cannot be a ground for concluding that clear and explicit expression of refusal to perform military service is not a "manifestation" of a belief.

29. The Government submits that the criminal punishment of conscientious objectors based on the Constitution and the Military Service Act fulfils a justifiable restriction necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others as defined in article 18 (3) of the Covenant. Mr. Shin and Mr. Baek were sentenced to imprisonment based on article 39 of the Constitution, which provides that all citizens shall have the duty of national defence. The detention of both individuals was the result of a fair trial by an independent judiciary concluding that a conscientious refusal to be enlisted in the military did not fall within the purview of the justifiable grounds referred to in the Military Service Act. It is, therefore, clear that the criminal punishment of Mr. Shin and Mr. Baek is a limitation based on legitimate legal grounds.

30. According to the Government, the detention of Mr. Shin and Mr. Baek is necessary to protect public safety and the fundamental rights and freedoms of others. The Government recalls the statement of the Human Rights Committee in its general comment No. 22 that restrictions on the freedom of conscience must be necessary and proportionate (see para. 8). In the present case, the Government submits that criminal sanctions against conscientious objectors are inevitable and legitimate restrictions in the light of the unique security situation on the Korean Peninsula.

31. The military service system of the Republic of Korea is based on conscription and the Government has an obligation to operate the system in a fair and equitable manner.

[1] In that case, the Government had argued that that the claim of conscientious objection could be extended in order to justify acts such as a refusal to pay taxes or refusal of mandatory education.

Active duty soldiers reside inside a military unit and their fundamental rights, such as the right to liberty or to privacy, are limited. To avoid these burdens, some citizens commit illegal acts by renouncing their nationality or manipulating medical records for the purpose of evading military service. This underlines the need for a fair and equal imposition of military service.

32. According to the Government, courts in the Republic of Korea generally sentence conscientious objectors to 18 months' imprisonment. A minimum of 18 months in prison is required to prevent conscientious objectors from being subject to a further notice of enlistment. As a result, Mr. Shin and Mr. Baek were sentenced to 18 months' imprisonment. By comparison, active duty soldiers spend between 21 and 23 months in military service. If one compares the length of service and the length of imprisonment, as well as the similar limitations on one's right to movement, and taking into account the possibility of parole, a sentence of 18 months' imprisonment for conscientious objectors cannot be considered an extraordinarily punitive punishment that violates the principle of proportionality. The Government therefore submits that the detention of Mr. Shin and Mr. Baek was not arbitrary.

33. While the Government maintains criminal sanctions against conscientious objectors, it has been engaged since 2006 in continuous efforts to review the introduction of alternative military service through public hearings, polling and research. Nevertheless, there has been no change in the Government's position that the punishment of conscientious objectors pursuant to article 88 (1) of the Military Service Act must be maintained for the sake of public safety.

34. Finally, the Government notes that the Constitutional Court ruled on 25 June 2018 that article 5 (1) of the Military Service Act is unconstitutional because it violates the freedom of conscience by not specifying alternative military service for conscientious objectors. At the same time, the Constitutional Court ruled that article 88 (1) of the Military Service Act, which allows for the imprisonment of conscientious objections, is not unconstitutional. Following this decision, the National Assembly is required to amend the law to adopt alternative service by 31 December 2019. Building on its previous research and findings, the Government will endeavour to secure social consensus regarding reasonable alternatives to military service in the near future. The Constitutional Court ordered temporary application of the existing provisions until the due date to amend the law. The Government seeks the Working Group's understanding of the fact that the current system will need to be maintained until the law is amended.

*Further comments from the source*

35. On 10 July 2018, the Government's response was sent to the source for further comment. The source responded on 24 July 2018 and noted that, in opinion No. 43/2017, the Working Group had concluded that the detention of a conscientious objector was arbitrary and violated articles 9, 18 and 26 of the Covenant. The source requests the Working Group to make a similar finding in the present case.

36. In addition, the source recalls that the Human Rights Committee has repeatedly emphasized that the Covenant must be interpreted as a living instrument that reflects the progress of international human rights law, including the evolution of the right to conscientious objection to military service. Although this right was not initially recognized, in its resolution 1989/59, the Commission on Human Rights recognized conscientious objection as a legitimate exercise of the right to freedom of thought, conscience and religion guaranteed by article 18 of the Covenant. In its general comment No. 22, the Human Rights Committee took a step further, finding that that right could be derived from article 18 of the Covenant. In 2011, the Committee found in the case of *Jeong et al. v. Republic of Korea* (CCPR/C/101/D/1642-1741/2007) that the right to conscientious objection to military service inheres in the right to freedom of thought, conscience and religion. Accordingly, the source submits that there is no doubt that article 18 of the Covenant is now regarded as including the right to conscientious objection to military service.

37. The source refers to subsequent jurisprudence of the Human Rights Committee, including the case of *Atasoy and Sarkut v. Turkey* (CCPR/C/104/D/1853-1854/2008). In that case, the Committee reiterated that the right to conscientious objection to military service was inherent in article 18 (1) of the Covenant and not a mere manifestation of religion. The source also refers to 16 separate cases considered by the Human Rights Committee from the Republic of Korea, Turkey and Turkmenistan in which it determined that the right to conscientious objection to military service is protected under article 18 (1) of the Covenant. The source argues with reference to these cases that, if the restriction of the right to conscientious objection due to national security concerns is a legitimate act, as the Government claims, the purpose of article 18 (1) of the Covenant would be defeated.

38. In addition, the source notes that in its general comment No. 22, the Human Rights Committee stated that article 18 (3) of the Covenant should be strictly interpreted to prevent infringement of the rights protected in article 18 (see para. 8). The source points out that, contrary to the Government's claims, national security is not included as a permissible limitation in article 18 (3) and therefore cannot be a basis to limit the freedom of conscience. Furthermore, in its general comment No. 22, the Committee states that, since the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief, the right to conscientious objection can be derived from article 18 (para. 11). However, the Government, through its own interpretation of the comment, attempts to justify the criminal punishment and detention of Mr. Shin and Mr. Baek.

39. The source acknowledges that the Constitutional Court rendered a landmark decision on 28 June 2018 ruling that article 5 (1) of the Military Service Act was unconstitutional because of its omission of alternative service for conscientious objectors. The source recalls that, although the Court ruled that article 88 (1) of the Act was constitutional, six of the nine justices expressed the view that the provision must be maintained to punish military service evaders, not conscientious objectors, and that punishing conscientious objectors in the absence of alternative service was unconstitutional.

40. Finally, the source recalls that the Government became a State party to the Covenant in 1990, and in the years between 1993 and 2003 participated in a total of seven resolutions of the Commission on Human Rights and Human Rights Council that recognize conscientious objection to military service as a "right". Therefore, the Government is obliged to respect the Covenant and the resolutions of the Commission and Council.

**Discussion**

41. The Working Group thanks the source and the Government for their submissions.

42. In determining whether the deprivation of liberty of Mr. Shin and Mr. Baek is arbitrary, the Working Group has regard to the principles established in its jurisprudence to deal with evidentiary issues. If the source has presented a prima facie case for breach of the international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations. Mere assertions by the Government that lawful procedures have been followed are not sufficient to rebut the source's allegations (see A/HRC/19/57, para. 68).

43. This case concerns the right to conscientious objection to perform military service. It is, therefore, appropriate to briefly restate the principles relating to the freedom of conscience, drawing upon the considerable body of legal analysis and jurisprudence developed by the Working Group, the Human Rights Committee and other human rights mechanisms.

(a) In its annual report for 2000, the Working Group recommended that all States adopt appropriate legislative or other measures to ensure that conscientious objector status is recognized and attributed (see E/CN.4/2001/14, paras. 91–94). Until such measures have been adopted, the prosecution of conscientious objectors should not give rise to more than

one conviction, so as to prevent the judicial system from being used to force individuals to change their beliefs;[3]

(b) In its jurisprudence and following its country visits, the Working Group has reiterated that conscientious objection derives from the right to freedom of thought, conscience and religion protected under article 18 of the Universal Declaration of Human Rights and article 18 of the Covenant.[4] In its earlier jurisprudence, the Working Group stated that it considered conscientious objection to military service to be a manifestation of one's conscience (see, for example, opinion No. 16/2008). However, the approach of the Working Group has evolved over time to embrace a more progressive approach that expands the scope of human rights, and reflects a growing consensus regarding the harm to society involved in obliging individuals to take up arms and to take part in a military process involving training in the use of force despite their convictions. The Working Group has, most recently, treated the detention of a conscientious objector as a violation per se of article 18 (1) of the Covenant (see opinion No. 43/2017);

(c) In its general comment No. 22, the Human Rights Committee stated that, while the Covenant does not explicitly refer to a right to conscientious objection, such a right can be derived from article 18, inasmuch as the obligation of an individual to use lethal force within a military institution might seriously conflict with the freedom of conscience and the right to manifest one's religion or belief (para. 11). In 2011, the Committee stated, in the case of *Jeong et al. v. Republic of Korea*, that the right to conscientious objection entitles any individual to an exemption from compulsory military service if this cannot be reconciled with that individual's religion or beliefs (paras. 7.2–7.4).[5] The Committee also found that a State may compel the objector to undertake a civilian alternative to military service, outside the military sphere and not under military command. Alternative service must not be punitive, it must be a real service to the community, and compatible with respect for human rights (para. 7.3). The case of Min-Kyu Jeong represented a departure by the majority of the Committee from its previous jurisprudence. A majority of the Committee now treats the right to conscientious objection to military service as part of the absolutely protected right to hold a belief under article 18 (1) of the Covenant, which cannot be restricted by States.[6] The Working Group strongly agrees with and fully embraces this approach;

(d) The Human Rights Council, and before that the Commission on Human Rights, have recognized the right to conscientious objection to military service as a legitimate exercise of the right to freedom of thought, conscience and religion under article 18 of the Universal Declaration of Human Rights and article 18 of the Covenant.[7] The Human Rights Council has emphasized that States should refrain from imprisoning individuals solely on the basis of their conscientious objection to military service, and should release those that have been so imprisoned.[8]

44. Applying the above principles to the present case, it is clear that the deprivation of liberty of Mr. Shin and Mr. Back is the direct result of their genuinely held religious and conscientious beliefs as Jehovah's Witnesses in refusing to enlist in military service. Accordingly, the Working Group finds that the detention of Mr. Shin and Mr. Back violates

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[3] The possibility of being placed in double jeopardy does not apply to either Mr. Shin or Mr. Back. As the Government noted in its response, the courts referred to the determination of Mr. Shin and Mr. Back to refuse to perform military service, and sentenced both defendants to the minimum punishment (18 months' imprisonment) necessary to exempt them from future military service.

[4] See, for example, opinions No. 43/2017, No. 16/2008, No. 8/2008 and No. 24/2003. See also A/HRC/16/47/Add.3, para. 68, and A/HRC/10/21/Add.3, para. 66.

[5] However, see *Jung et al. v. Republic of Korea* (CCPR/C/98/D/1593-1603/2007) and *Yoon and Choi v. Republic of Korea* (CCPR/C/88/D/1321-1322/2004).

[6] See *Kim et al. v. Republic of Korea* (CCPR/C/112/D/2179/2012). Several members of the Committee provided dissenting views on this point.

[7] See, for example, Human Rights Council resolutions 36/18, 24/17 and 20/2, and Commission on Human Rights resolutions 2004/35, 2002/45, 2000/34, 1998/77, 1995/83, 1993/84, 1991/65 and 1989/59.

[8] See Human Rights Council resolution 24/17, paras. 10 and 11.

the absolutely protected right to hold or adopt a religion or belief under article 18 of the Universal Declaration of Human Rights and article 18 (1) of the Covenant. Unlike the manifestation of religious belief, this absolutely protected right to hold or adopt a religion or belief is not subject to limitation under article 18 (3) of the Covenant. In the view of the Working Group, there can be no limitation or possible justification under the Covenant for forcing a person to perform military service, as to do so would completely undermine the right to freedom of thought, conscience and religion in article 18 (1) of the Covenant.[9] The Working Group does not accept the Government's argument that this interpretation may result in a de facto invalidation of article 18 (3) of the Covenant. That provision still applies to various forms of manifestation of religion or belief. Moreover, other forms of conscientious objection that do not involve military service may be determined in future as being subject to limitation under article 18 (3).[10]

45. The Working Group concludes that the deprivation of liberty of Mr. Shin and Mr. Baek is arbitrary under category II, and also falls within category I as it lacks legal basis.

46. The Working Group takes note that there is currently no alternative civilian service in the Republic of Korea to accommodate the beliefs of conscientious objectors, but that the Government is undertaking consultations on the development of such service in the light of the recent ruling of the Constitutional Court. The Working Group urges the Government to adopt appropriate measures as a matter of urgency to exempt conscientious objectors from military service or to provide a non-punitive alternative compatible with respect for human rights.

47. Furthermore, as the Working Group has already noted, Mr. Shin and Mr. Baek were deprived of their liberty because of their position of conscience and beliefs as Jehovah's Witnesses. Mr. Baek received particularly harsh treatment compared to other conscientious objectors because, unlike others in a similar position, he was detained by court order with immediate effect. Moreover, the day after Mr. Baek's sentencing, a conscientious objector in a similar situation was found not guilty by another trial court. The Government did not address these allegations in its submission. Accordingly, the Working Group finds that Mr. Shin and Mr. Baek were deprived of their liberty on discriminatory grounds due to their religion, in violation of articles 2 and 7 of the Universal Declaration of Human Rights and articles 2 (1) and 26 of the Covenant. Their deprivation of liberty is arbitrary according to category V. The Working Group refers this case to the Special Rapporteur on freedom of religion or belief.

48. In addition to the Working Group's findings, there is widespread concern in the international community about the deprivation of liberty of conscientious objectors in the Republic of Korea. That concern is reflected in the recommendations made in the December 2017 report of the Working Group on the Universal Periodic Review on the Republic of Korea (A/HRC/37/11). Those recommendations included the decriminalization of conscientious objection to military service, the release of conscientious objectors and the introduction of a civilian alternative to military service (paras. 132.94–132.106). Moreover, in its concluding observations on the fourth periodic report of the Republic of Korea, the Human Rights Committee expressed concern that conscientious objectors continue to be subjected to criminal punishment. The Committee stated that persons detained for refusing to perform military service should be immediately released and compensated, and that their criminal records should be expunged (see CCPR/C/KOR/CO/4, paras. 44–45 and 59).

49. In the light of the above analysis, the Working Group urges the Government to uphold the right to conscientious objection to military service in accordance with its obligations under the Covenant. In addition, as the Working Group has previously stated, the duty to comply with international human rights rests not only on the Government but on all officials, including judges, police and security officers, and prison officers with relevant responsibilities.[11] Accordingly, the Working Group urges the national courts of the

[9] See *Hasan and Sarkut v. Turkey* (individual concurring opinion of Committee member Fabian Omar Salvioli, para. 18).

[10] Ibid., paras. 2 and 18.

[11] See, for example, opinions No. 47/2012, para. 22, 64/2011, para. 25, and 16/2011, para. 5.

Republic of Korea, particularly the Supreme Court, to apply the jurisprudence of the Working Group and the Human Rights Committee on conscientious objection to military service by ordering the immediate release and compensation of Mr. Shin and Mr. Baek. This would ensure that they have an effective remedy in accordance with article 8 of the Universal Declaration of Human Rights and article 2 (3) of the Covenant.

50. The Working Group would welcome the opportunity to engage constructively with the Government on issues relating to the arbitrary deprivation of liberty. The Working Group has held discussions with the Government in relation to conducting a country visit. The Working Group recalls that the Government issued a standing invitation to all thematic special procedure mandate holders on 3 March 2008, and looks forward to a positive response to its request to visit the Republic of Korea.

**Disposition**

51. In the light of the foregoing, the Working Group renders the following opinion:

> The deprivation of liberty of Jeong-in Shin and Seung-hyeon Baek, being in contravention of articles 2, 7, 9 and 18 of the Universal Declaration of Human Rights and of articles 2 (1), 9, 18 (1) and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II and V.

52. The Working Group requests the Government of the Republic of Korea to take the steps necessary to remedy the situation of Mr. Shin and Mr. Baek without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

53. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Shin and Mr. Baek immediately, to accord them an enforceable right to compensation and other reparations, in accordance with international law, and to expunge their criminal records.

54. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Mr. Shin and Mr. Baek and to take appropriate measures against those responsible for the violation of their rights.

55. The Working Group requests the Government to bring its laws, particularly the Military Service Act, into conformity with the recommendations made in the present opinion and with the commitments made by the Republic of Korea under international human rights law.

56. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers this case to the Special Rapporteur on freedom of religion or belief, for appropriate action.

57. The Working Group requests the Government to disseminate the present opinion through all available means and as widely as possible.

**Follow-up procedure**

58. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

(a) Whether Mr. Shin and Mr. Baek have been released and, if so, on what date;

(b) Whether compensation or other reparations have been made to Mr. Shin and Mr. Baek;

(c) Whether an investigation has been conducted into the violation of Mr. Shin's and Mr. Baek's rights and, if so, the outcome of the investigation;

(d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of the Republic of Korea with its international obligations in line with the present opinion;

(e) Whether any other action has been taken to implement the present opinion.

59. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example, through a visit by the Working Group.

60. The Working Group requests the source and the Government to provide the above information within six months of the date of the transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

61. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.[5]

[*Adopted on 20 August 2018*]

[5] See Human Rights Council resolution 33/30, paras. 3 and 7.

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**Human Rights Council**
**Working Group on Arbitrary Detention**

# Opinions adopted by the Working Group on Arbitrary Detention at its eighty-second session, 20–24 August 2018

## Opinion No. 41/2018 concerning Juan Pedro Lares Rangel (Bolivarian Republic of Venezuela)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The mandate of the Working Group was most recently extended for a three-year period in Council resolution 33/30.

2. In accordance with its methods of work (A/HRC/36/38), on 16 April 2018, the Working Group transmitted to the Government of the Bolivarian Republic of Venezuela a communication concerning Juan Pedro Lares Rangel. The Government has not replied to the communication. The State is a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation,

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disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

**Submissions**

*Communication from the source*

4. Juan Pedro Lares Rangel, a Venezuelan and Colombian national born in 1994, is a trader and student habitually resident in the parish of Matriz in the municipality of Campo Elías, Mérida in the Bolivarian Republic of Venezuela. He is the son of the former mayor of the municipality of Campo Elías, a member of the Voluntad Popular (Will of the People) (VP) party and opponent of the national Government who was elected as a representative of the Mesa de la Unidad Democrática (Democratic Unity Round Table) (MUD) coalition and is currently in exile in Colombia.

5. According to the information received, on the afternoon of 30 July 2017, around 200 armed officers of the Bolivarian National Guard, the Bolivarian National Police Force and the Bolivarian National Intelligence Service arrived at the family home of Mr. Lares Rangel without a warrant and began shooting at the front door with the intention of entering and arresting his father, who was the mayor of the municipality at the time.

6. The source reports that the family of Mr. Lares Rangel managed to escape from the back of the house and over their neighbours' roofs. However, Mr. Lares Rangel stayed behind and was arrested, even though the officers had no arrest warrant and had not caught him in flagrante delicto. He was forced to come down with his hands up. He was beaten with a pistol by men who identified themselves as members of the Bolivarian National Intelligence Service, who took him briefly to unit 16 of the Bolivarian National Guard, then to a head office of the Bolivarian National Intelligence Service. There, he was allegedly subjected to physical and psychological ill-treatment, then forced to pose alongside weapons, mortars and a police shield while being photographed. The source claims that Mr. Lares Rangel was taken hostage in order to pressure his father to turn himself in.

7. On 1 August 2017, the family of Mr. Lares Rangel filed a complaint for abduction and violation of fundamental rights with Prosecutor's Office No. 13 and the Public Defender Service of the State of Mérida. A second complaint regarding the violation of the fundamental rights of Mr. Lares Rangel was filed with Prosecutor's Office No. 81 of Caracas on 2 August 2017. It is reported, however, that no response to those complaints has been received.

8. The source notes that, after 48 hours in detention, Mr. Lares Rangel had not been brought before a court as required by Venezuelan law. At the time when the case was submitted to the Working Group, Mr. Lares Rangel had still not been brought before a court.

9. In the week after the arrest, the family of Mr. Lares Rangel received unofficial information that he was being held in El Helicoide prison in Caracas. That information was received not from the police, the prosecution service or official sources but from the mother of another young person who was being detained in the same place. The family of Mr. Lares Rangel went to El Helicoide prison several times to ascertain whether he was being held there, without success.

10. The source reports that, on 15 August 2017, thanks to the intervention of the Embassy of Colombia in Caracas, the family of Mr. Lares Rangel was able to enter El Helicoide prison for the first time to participate in a consular visit. It is reported that Mr. Lares Rangel was found there in a delicate state of health, having lost weight and colour, and that he begged his visitors, trembling, to remove him from there, on account of the ill-treatment that he had suffered at the hands of the officers of the Bolivarian National Intelligence Service. On 26 September 2017, Mr. Lares Rangel received a second consular visit at El Helicoide prison, during which members of his family were able to see him.

11. On 28 September 2017, the family of Mr. Lares Rangel filed a complaint against his detention with the prosecution service. A lawyer from a non-governmental human rights organization in Venezuela later told the family that the Attorney General of the Republic

had contacted her to inform her that the case had allegedly been assigned to a judge, who had requested information from the Bolivarian National Intelligence Service but had received no response.

12. On 1 October 2017, the family of Mr. Lares Rangel submitted a request for precautionary measures to the Inter-American Commission on Human Rights (IACHR).

13. On 18 October 2017, the family of Mr. Lares Rangel contacted Prosecutor's Office No. 13 of the State of Mérida again in order to request copies of the case file and to submit copies of the complaints filed with other institutions. They received no response to their request.

14. On 31 October 2017, during a third consular visit, members of Mr. Lares Rangel's family saw that his state of health had deteriorated even further, he had lost a significant amount of weight and he had had various health problems, including stomach problems, allergies, influenza, complications after an insect bite and scabies. It is reported that his psychological and emotional state had also been quite badly affected.

15. On 22 November 2017, the family of Mr. Lares Rangel was informed by the Ministry of Foreign Affairs of Colombia that it had sent three notes verbales regarding the situation of Mr. Lares Rangel to the Ministry of Foreign Affairs of Venezuela, via the Embassy of Colombia in Caracas. However, it had received no response to those notes verbales.

16. The source reports that the Venezuelan authorities have not officially recognized the detention of Mr. Lares Rangel; his name does not appear on any list of prisoners in El Helicoide prison and he has not been brought before any judicial authority. The source notes that "his situation makes him vulnerable to forced disappearance, torture and other cruel, inhuman or degrading treatment, and the continuing violation of his fundamental rights".

17. The source reports that Mr. Lares Rangel is being held in a cell with about 20 people and that he cannot communicate with his family, make telephone calls or receive visits. Moreover, he is not allowed to go outside in the fresh air and the sun, the sanitary conditions in his cell are poor and his access to water is limited.

18. The source claims that the deprivation of liberty of Mr. Lares Rangel has no legal basis and is therefore arbitrary under category I. It notes that there was no legitimate reason for his arrest, since he had not committed any offence, the arrest was not justified by a warrant or any other type of legal instrument and he was not caught in flagrante delicto. He was deprived of his liberty after State forces raided his home in search of his father; they were unable to arrest his father and therefore detained Mr. Lares Rangel in order to create pressure. The source emphasizes that the authorities have not brought him before a court to be formally charged, they have not recognized his detention officially and they have not included him on any list of detainees. The source argues that the actions of the authorities in this case constitute a violation of article 44 of the Venezuelan Constitution, which establishes the right to personal liberty as an inviolable right.

19. The source also notes that this case involves a violation of the right to due process, which is enshrined in article 49 of the Venezuelan Constitution, and that the detention of Mr. Lares Rangel is therefore arbitrary under category III. This is due to the fact that he has not been brought before a judicial authority in order to establish the legal basis for his detention, as should have happened within 48 hours of his arrest. Moreover, the authorities have failed in their duty to explain the reasons for his arrest and continued detention. The source also alleges that the principle of the presumption of innocence and the right to challenge the legality of the detention before a court have been violated.

**Discussion**

20. The Working Group is mandated to investigate all cases of deprivation of liberty imposed arbitrarily that are brought to its attention. In the discharge of its mandate, it refers to the relevant international standards set forth in the Universal Declaration of Human Rights and the Covenant, as well as to other relevant international legal instruments, in accordance with its methods of work.

21. The Working Group has, in its jurisprudence, established the ways in which it deals with evidentiary issues. If the source has established a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations (see A/HRC/19/57, para. 68). In the present case, the Government has chosen not to challenge the prima facie credible allegations made by the source.

22. The Working Group has been informed that Mr. Lares Rangel was released from prison on 1 June 2018. However, in accordance with paragraph 17 (a) of its methods of work, the Working Group has decided to deal with the communication through its regular procedure and to issue the present opinion.

23. According to convincing information that was submitted to the Working Group by the source and has not been contradicted by the Government, Mr. Lares Rangel is the son of the former mayor of the municipality of Campo Elías who was elected in 2013 and is a member of the Voluntad Popular party and an opponent of the national Government.

24. The Working Group was convinced by the claim that, on 30 July 2017, officers of the Bolivarian National Guard, the Bolivarian National Police Force and the Bolivarian National Intelligence Service forced their way into his house to arrest his father, who managed to escape. That day, Mr. Lares Rangel was violently arrested, without an arrest warrant and without having been caught in flagrante delicto. He was subsequently transferred to a facility belonging to the Bolivarian National Intelligence Service. One week later, he was transferred to El Helicoide prison, where he was deprived of his liberty. Mr. Lares Rangel has not been informed of the reasons for his detention or formally charged with any offence.

25. In the light of the above, the Working Group considers that Mr. Lares Rangel was deprived of his liberty arbitrarily under category I, since the Government has been unable to invoke any legal grounds that would justify his detention.

26. The Working Group also received credible allegations that Mr. Lares Rangel's right to due process was seriously violated, as he was not able to seek immediate clarification of his legal status before a judicial authority. Moreover, he was not informed of the reasons for his detention and he was not allowed to challenge the legality of his detention before a court. Consequently, the Working Group considers that the detention of Mr. Lares Rangel was arbitrary under category III, owing to the grave violations of his rights under articles 9–11 of the Universal Declaration of Human Rights and articles 9 and 14 of the Covenant.

27. The Working Group is of the view that the detentions described in the present case are not the first to be carried out by the authorities of the Bolivarian Republic of Venezuela against political opponents, human rights defenders and persons who criticize the authorities' actions. The Working Group has observed that there is a systematic practice of depriving people of their liberty in a manner that violates the fundamental rules of international law enshrined in the Universal Declaration of Human Rights and the Covenant.

28. In view of the above, the detention of Mr. Lares Rangel constituted a violation of international law because it was based on discrimination on the grounds of his political opinion and his membership of Voluntad Popular, an opposition party. Moreover, according to information submitted by the source that has not been refuted by the Government, the authorities were initially going to arrest his father, who was the local mayor for the same party; this is an aggravating factor with respect to the detention of Mr. Lares Rangel. Consequently, the Working Group considers that the detention of Mr. Lares Rangel by the authorities of the Bolivarian Republic of Venezuela contravenes articles 2 and 26 of the Covenant and articles 1 and 7 of the Universal Declaration of Human Rights and thus constitutes arbitrary detention under category V.

29. The Working Group wishes to recall that, under certain circumstances, imprisonment and other severe forms of deprivation of liberty in violation of internationally recognized standards may constitute crimes against humanity.[1]

30. In recent years, the Working Group has repeatedly expressed its views on multiple arbitrary arrests of political opponents of the Government and individuals who have exercised their rights to freedom of opinion, expression, association, assembly or political participation.[2] In the Working Group's view, this is an attack by the Government on its political opponents or part of a systematic attempt to deprive them, particularly those who are seen as opponents of the regime, of their physical freedom, in violation of fundamental rules of international law, including the Universal Declaration of Human Rights and the Covenant.

31. In the light of the recurrent pattern of arbitrary detention identified by this international human rights mechanism in recent years, the Government is urged to consider inviting the Working Group to make an official country visit. Such visits are an opportunity for the Working Group to engage in direct constructive dialogue with the Government and representatives of civil society, with the aim of better understanding the situation of deprivation of liberty in the country and the underlying reasons for arbitrary detention.

32. Lastly, in view of the source's allegations concerning the torture and cruel, inhuman or degrading treatment that may have been suffered by Mr. Lares Rangel during his arrest and detention and the dire conditions of detention (in terms of food, overcrowding and sanitation), the Working Group refers the present case, for information and possible action, to the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

**Disposition**

33. In the light of the foregoing, the Working Group renders the following opinion:

> The deprivation of liberty of Juan Pedro Lares Rangel, being in contravention of articles 1, 7, 9–11 and 19–21 of the Universal Declaration of Human Rights and of articles 2, 9, 14, 19, 21, 22, 25 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, III and V.

34. The Working Group requests the Government of the Bolivarian Republic of Venezuela to take the steps necessary to remedy the situation of Mr. Lares Rangel without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the Covenant.

35. The Working Group considers that, taking into account all the circumstances of the case and in accordance with international law, victims of arbitrary detention have the right to seek and receive reparation from the State, including restitution, compensation,

[1] Opinions Nos. 37/2011, para. 15; 38/2011, para. 16; 39/2011, para. 17; 4/2012, para. 26; 47/2012, paras. 19 and 22; 34/2013, paras. 31, 33 and 35; 35/2013, paras. 33, 35 and 37; 36/2013, paras. 32, 34 and 36; 38/2012, para. 33; 48/2013, para. 14; 22/2014, para. 25; 27/2014, para. 32; 34/2014, para. 34; 35/2014, para. 19; 44/2016, para. 37; 32/2017, para. 40; 33/2017, para. 102; and 36/2017, para. 110.

[2] Opinions Nos. 52/2017 (Gilbert Alexander Caro Alfonzo), 37/2017 (Braulio Jatar), 18/2017 (Yon Alexander Goicoechea Lara), 27/2015 (Antonio José Ledezma Diaz), 26/2015 (Gerardo Ernesto Carrero Delgado, Gerardo Rafael Resplandor Veracierta, Nixon Alfonzo Leal Toro, Carlos Perez and Renzo David Prieto Ramirez), 7/2015 (Rosmit Mantilla), 1/2015 (Vincenzo Scarano Spisso), 51/2014 (Maikel Giovanni Rondon Romero and 316 others), 26/2014 (Leopoldo Lopez), 29/2014 (Juan Carlos Nieto Quintero), 30/2014 (Daniel Omar Ceballos Morales), 47/2013 (Antonio José Rivero González), 56/2012 (Cesar Daniel Camejo Blanco), 28/2012 (Raul Leonardo Linares), 62/2011 (Sabino Romero Izarra), 65/2011 (Hernan José Sifontes Tovar, Ernesto Enrique Rangel Aguilera and Juan Carlos Carvallo Villegas), 27/2011 (Marcos Michel Siervo Sabarsky), 28/2011 (Miguel Eduardo Osio Zamora), 31/2010 (Santiago Giraldo Florez, Luis Carlos Cossio, Cruz Elba Giraldo Florez, Isabel Giraldo Celedón, Secundino Andres Cadavid, Dimas Oreyanos Lizcano and Omar Alexander Rey Perez), and 10/2009 (Eligio Cedeño).

rehabilitation, satisfaction and guarantees of non-repetition. The Working Group therefore requests the Government to make appropriate reparation to Mr. Lares Rangel.

36. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary detention of Mr. Lares Rangel and to take appropriate measures against those responsible for the violation of his rights, including by ensuring impartial and independent follow-up to the complaints that were submitted to the prosecution service in August and September 2017 regarding the offences of abduction, violation of fundamental rights and deprivation of liberty committed against Mr. Lares Rangel.

37. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment and the Special Rapporteur on the rights to freedom of peaceful assembly and of association, for information and possible action.

38. The Working Group requests the Government to disseminate the present opinion through all available means and as widely as possible.

**Follow-up procedure**

39. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

(a) Whether compensation or other reparations have been made to Mr. Lares Rangel;

(b) Whether an investigation has been conducted into the violation of Mr. Lares Rangel's rights and, if so, the outcome of the investigation;

(c) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of the Bolivarian Republic of Venezuela with its international obligations in line with the present opinion;

(d) Whether the present opinion has been publicized and widely disseminated through all available means;

(e) Whether any other action has been taken to implement the present opinion.

40. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example, through a visit by the Working Group.

41. The Working Group requests the source and the Government to provide the above information within six months of the date of the transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

42. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.[1]

[*Adopted on 20 August 2018*]

[1] See Human Rights Council resolution 33/30, paras. 3 and 7.